



United Nations

Report of the Human Rights Committee

Volume II (Part One)

**105th session
(9–27 July 2012)**

**106th session
(15 October–2 November 2012)**

**107th session
(11–28 March 2013)**

**General Assembly
Official Records
Sixty-eighth session
Supplement No. 40 (A/68/40)**

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United Nations • New York, 2013

Note

Symbols of United Nations documents are composed of letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Annex IX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 1226/2003, *Korneenko v. Belarus* (Views adopted on 20 July 2012, 105th session)*

<i>Submitted by:</i>	Viktor Korneenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	5 August 2003 (initial submission)
<i>Subject matter:</i>	Holding the chairperson of a public association accountable under law for the use of computer equipment received as “untied foreign aid” for the preparation for and monitoring of elections and confiscation of the equipment in question
<i>Procedural issues:</i>	Level of substantiation of a claim; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair hearing by an independent and impartial tribunal; right to impart information and ideas; right to freedom of association; permissible restrictions; right to take part in the conduct of public affairs; right to the equal protection of the law without any discrimination
<i>Articles of the Covenant:</i>	14, para. 1; 19, para. 2; 22, para. 1; 25 (a); 26
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 20 July 2012,</i>	

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Having concluded its consideration of communication No. 1226/2003, submitted to the Human Rights Committee by Viktor Korneenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Viktor Korneenko, a Belarusian national born in 1957 and residing in Gomel, Belarus. He claims to be a victim of violations by Belarus of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

The facts as presented by the author

2.1 The author is the Chairperson of the Gomel regional association Civil Initiatives. On 13 August 2001, premises of Civil Initiatives were searched by officers of the Department of State Security Committee of Gomel Region (DSSC) pursuant to a search warrant issued by the Prosecutor of Gomel Region, in connection with a criminal investigation under article 341 of the Criminal Code (desecration of buildings and damage to property) concerning political slogans that had been painted on buildings in Gomel between May and 9 August 2001. The author states that the search and seizure of the Civil Initiatives' computer equipment¹ by the DSSC was carried out in violation of article 210 of the Criminal Procedure Code (the procedure of search and seizure) and the Instruction on the procedure of seizure, registration, storage and transfer of material evidence, money, valuables, documents and other property in criminal cases (Instruction). Specifically, seized computers were not packed and sealed by the investigator and other officers that took part in the search. This fact is documented in the search report of 13 August 2001.

2.2 On 17 August 2001, DSSC notified the Inspectorate of the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel that, contrary to Civil Initiatives' statutory activities, it was using the computer equipment, reportedly received as untied foreign aid and subsequently seized in the search, to monitor the 2000 parliamentary elections and 2001 presidential elections in Belarus, as well as for other political activities such as the preparation and reproduction of unregistered publications and propaganda materials.

2.3 On 18 August 2001, the criminal case (see para. 2.1 above) was transmitted for jurisdictional reasons by DSSC to the Department of Investigation Committee under the Ministry of Internal Affairs of Gomel Region. On 9 October 2001, the Department's investigator suspended pretrial investigation in this case, as the investigation had exhausted all possibilities of identifying the culprits responsible for the painting of political slogans, and ordered DSSC to return the computer equipment seized to Civil Initiatives. By letter of the Deputy Head of the Department dated 14 October 2002, the author was informed that Civil Initiatives' property seized by DSSC during the search of 13 August 2001 was not

¹ Equipment seized consisted of six central processing units, six monitors, three printers, one scanner, one copier, six keyboards and six computer mouse devices.

admitted as material evidence and had not been transmitted to the Department together with the criminal case in question. The author adds that, under article 27 of the Belarus Constitution and article 8 of the Criminal Procedure Code, any evidence obtained in violation of the law is inadmissible and cannot be used as a basis for criminal prosecution.

2.4 On an unspecified date, the author complained to the Prosecutor of Gomel Region about a violation of the criminal procedure law by the DSSC investigator who carried out the search of Civil Initiatives' premises on 13 August 2001 and requested the Prosecutor to recognize the evidence obtained during the search as inadmissible in a legal proceeding. On 12 October 2001, the Prosecutor replied that the search of Civil Initiatives' premises was carried out under his search warrant and in compliance with criminal procedure law. By the same letter, the author was officially advised that, as of 9 October 2001, criminal prosecution of executive officers of Civil Initiatives in relation to that case had been terminated and that he should contact to the DSSC for the return of the seized property.

2.5 From 5 to 27 November 2001, the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel undertook a tax inspection of the activities of Civil Initiatives but did not establish any violation of the law. In its tax inspection report, however, it did use the information provided to it by the DSSC on 17 August 2001 on the use of computer equipment seized during the search of Civil Initiatives' premises (see para. 2.2 above). On 10 December 2001, the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel drew up and transmitted to the court an administrative report in relation to the author. He was accused of having committed an administrative offence, envisaged by paragraph 4, part 3, of the temporary Presidential Decree No. 8 on certain measures emending the procedure for the acceptance and use of untied foreign aid of 12 March 2001 (Presidential Decree). The latter proscribes the use of untied foreign aid for the preparation for and conduct of elections, referendums, recall of a deputy or of a member of the Council of the Republic, for the preparation of gatherings, meetings, street marches, demonstrations, pickets, strikes, the production and dissemination of politically charged material, as well as the organization of seminars and other forms of politically charged activities directed at the public at large. In accordance with paragraph 5.3 of the Presidential Decree, untied foreign aid received shall be confiscated and its recipients shall incur an administrative penalty (fine) if such foreign aid was misused, as well as used for any of the purposes proscribed by paragraph 4, part 3, of the Decree.

2.6 The author notes that not all of the computer equipment seized during the search of Civil Initiatives' premises was received as untied foreign aid for the fulfilment of its statutory activities. Thus, not all of the computer equipment is subject to the punitive sanctions envisaged by the Presidential Decree.

2.7 On 25 January 2002, a judge for administrative cases and enforcement proceedings of the Zheleznodorozhniy District Court of Gomel examined the administrative report of 10 December 2001 in relation to the author and concluded that Civil Initiatives has used the computer equipment, received as untied foreign aid, "for the so-called independent monitoring of the 2001 presidential elections in Belarus and carrying out related publicity activities in the course of the 2001 presidential elections in Belarus", contrary to paragraph 4, part 3, of the Presidential Decree. Further to paragraph 5.3 of the decree, the author was fined 1 million Belarusian roubles (equal at that time to 615 US dollars) and the confiscation of five central processing units, two printers, five keyboards and five computer mouse devices seized was ordered. The author claims that:

(a) In finding him guilty, the court used the evidence obtained by DSSC in violation of procedural law. All the motions contesting the admissibility of such evidence that were submitted by the author and his defence counsel have been rejected by the court as unfounded. During the hearing, the judge stated that, despite the fact that the evidence was obtained in violation of the law, she had no grounds not to believe a public body such

as DSSC. The author's testimony and that of witnesses appearing on his behalf were ignored;

(b) The DSSC investigator who carried out the search of Civil Initiatives' premises on 13 August 2001 testified in court that he did not seal the seized equipment as it was required of him by law and was reprimanded for that by his superiors. The author notes that the investigator effectively admitted that he obtained the evidence in violation of article 27 of the Belarus Constitution;

(c) The court refused to establish exactly what of the computer equipment seized appearing in the case as material evidence had been received as untied foreign aid;

(d) The court did not take into account that the information it considered to be contrary to paragraph 4, part 3, of the Presidential Decree was reportedly downloaded from the computer in the absence of any witnesses and only on 7 October 2001, that is, several months after DSSC notified the Ministry of Customs and Duties of the Zheleznodorozhnyi District of Gomel of the improper use of the equipment in question by Civil Initiatives (see para. 2.2 above).

2.8 Under Belarusian law, a ruling of the first instance district court in an administrative case is final and cannot be appealed within the framework of administrative proceedings. It can, however, be appealed through a supervisory review procedure to the regional court and the Supreme Court.

2.9 On 1 March 2002, a Chairperson of the Gomel Regional Court dismissed the author's request for a supervisory review of the ruling of the Zheleznodorozhnyi District Court of Gomel of 25 January 2002.

2.10 On 5 March 2002, the same judge of the Zheleznodorozhnyi District Court of Gomel who issued the ruling of 25 January 2002 sent to the author another version of that ruling with a handwritten addition to the effect that five monitors seized would also be confiscated. The author perceived the judge's actions as tampering with a court ruling that had already become executory and, on an unspecified date, complained about it to the Ministry of Justice. By letter of the Ministry of Justice dated 10 April 2002, the author was informed that his complaint was examined and that, indeed, the judge had made an error and consequently incurred a disciplinary penalty.

2.11 On 16 May 2002, the Ministry of Justice sent a letter to the Chairperson of the Gomel Regional Court, suggesting to him that he "takes measures in relation to the judge's omissions" in examining the author's administrative case. On 29 May 2002, the Chairperson of the Gomel Regional Court re-examined the author's case, annulled the ruling of the Zheleznodorozhnyi District Court of Gomel of 25 January 2002² and sent the case back to the same court with a request for it to be examined by a different judge.

2.12 On 23 July 2002, another judge of the Zheleznodorozhnyi District Court of Gomel examined the author's administrative case and again concluded that Civil Initiatives had used the computer equipment, received as untied foreign aid, "for the so-called independent monitoring of the 2001 Presidential elections in Belarus and carrying out related publicity activities in the course of the 2001 Presidential elections in Belarus", contrary to paragraph 4, part 3, of the Presidential Decree. Further to paragraph 5.3 of the Decree, the author was fined with one million Belarusian Roubles (equal at that time to 550 US dollars) and, this

² The Chairperson of the Gomel Regional Court ruled that a judge of the Zheleznodorozhnyi District Court of Gomel failed to deliberate on what should have been done with each item of the computer equipment seized in the search of 13 August 2001, and not only with those that have been subject to confiscation under the court ruling.

time, the confiscation of all seized equipment was ordered. The author submits that the court again used the evidence obtained by DSSC in violation of procedural law.

2.13 On 26 August 2002, a Chairperson of the Gomel Regional Court dismissed the author's request for a supervisory review of the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002.

2.14 On 29 November 2002, the Deputy Prosecutor General replied in writing to the author's repeated complaints on the inadmissibility in court of evidence that was obtained illegally by DSSC on 13 August 2001. According to the letter received, there was no violation of the procedural law in obtaining the evidence in question, no complaints or objections were entered into the search report by any of the staff members of Civil Initiatives present during the search and seizure of the property, and it was impossible for the DSSC officers to seal up the equipment seized from Civil Initiatives due to its size. The author submits that article 210 of the Criminal Procedure Code and the Instruction (see para. 2.1 above) do not make any exception to the obligation to seal up a seized object based on the size; otherwise, under article 27 of the Belarus Constitution, the evidence in question would lose its evidentiary value.

2.15 On 30 December 2002, the First Deputy Chairperson of the Supreme Court dismissed the author's appeal under the supervisory review procedure against the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002 and noted that an administrative penalty imposed on him was determined in accordance with the sanctions provided for in the Presidential Decree, taking into account the offence committed and his "personal data". The author submits that, in his view, the phrase "personal data" refers to his political opinion and that of Civil Initiatives and, thus, violates article 26 of the Covenant, which prohibits discrimination on the ground of political opinion.

2.16 On 6 February 2003, the Head of the Department for Petitions and Citizens' Reception of the Supreme Court dismissed the author's repeated complaint under the supervisory review procedure, addressed to the Chairperson of the Supreme Court, about the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002.

2.17 On 24 January 2003, the author complained to the Constitutional Court about the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002 that was handed down on the basis of evidence obtained in violation of article 27 of the Belarus Constitution. By letter dated 11 February 2003, the Chairperson of the Constitutional Court confirmed that, under this article, any evidence obtained in violation of the law was inadmissible and could not be used as a basis for criminal prosecution, handing down of a court ruling or taking a decision by any public body. The author was advised that he had a right to complain about the ruling in question through the supervisory review procedure to the higher court or to the prosecutor. The letter further states that the Constitutional Court had confirmed on many occasions a direct application of article 60 of the Belarus Constitution, guaranteeing the right to judicial protection,³ and that, by refusing to consider citizens' complaints, the courts take responsibility for the non-observance of the Constitution.

³ Article 60 of the Belarus Constitution reads: "Everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law within time periods specified in law".

The complaint

3.1 The author claims that he was denied the right to equality before the courts and the determination of his rights and obligations in a suit at law (art. 14, para. 1, of the Covenant).

3.2 The author alleges that the State party authorities violated his right to equal protection of the law against discrimination (art. 26 of the Covenant), on the grounds of his political opinion.

3.3 Although he does not specifically invoke these articles, the facts as presented by the author appear to also raise issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), insofar as the compatibility of the Presidential Decree with the Covenant is concerned (see para. 6.1 below).

State party's observations on the merits

4.1 On 30 July 2008, the State party recalls the chronology of the case as summarized in paragraph 2.1 above and adds that the objects seized during the search of 13 August 2001 had been packed in 13 bags and sealed. It specifies that it had not been possible to pack the computer equipment due to its size and that it had been transported by officers to the DSSC premises. The State party argues that there was no violation of the procedural law by officers of the DSSC and submits that the author was informed of this fact on many occasions, including by the General Prosecutor's Office.

4.2 On 23 July 2002, a judge of the Zheleznodorozhniy District Court of Gomel had fined the author 1 million Belarusian roubles and ordered the confiscation of all computer equipment seized on the basis of paragraph 5.3 of the Presidential Decree. The author, as the Chairperson of Civil Initiatives, had been found guilty of having used, from 14 April to 13 August 2001, untied foreign aid (computer equipment) for purposes proscribed by the Presidential Decree, namely, the preparation for and conduct of the Presidential elections. The judge made the ruling on the basis of evidence that had been examined during the court proceedings. There were no corroborated facts that some evidence had been obtained in violation of law. The State party refutes the claim advanced by the author in court that he had reasons to believe that the aim of the proceedings was to discredit Civil Initiatives and him personally and states that his political opinion was irrelevant to the court proceedings and was not taken into account.

4.3 The State party asserts that the court proceedings in the author's case were public and that he was represented. On one occasion the author challenged the judge, who, in his opinion, was interfering with the examination of one of the witnesses by the author's representative. The State party submits that the judge has a right to pose questions to the participants at any stage of the court proceedings and that, for this reason, there were well-founded grounds to dismiss the author's challenge.

4.4 The State party concludes that there were well-founded reasons for holding the author administratively responsible under paragraph 5.3 of the Presidential Decree.

Author's comments on the State party's observations

5.1 On 7 November 2010, the author submits his comments on the State party's observations. He argues that that State party has effectively admitted that the computer equipment seized had not been sealed due to its size but continued to claim that it did not amount to a violation of procedural law. The author reiterates his initial claim that any evidence obtained in violation of law is inadmissible and cannot be used as a basis for criminal prosecution (paras. 2.1, 2.3 and 2.14 above). He refers to the letter of the Chairperson of the Constitutional Court of 11 February 2003 in support of this claim (para.

2.17 above) and submits that courts were supposed to exclude any evidence obtained in violation of law while examining his administrative case. The author claims that, by having based an administrative charge against him on the evidence obtained in violation of the law, the State party violated his rights under article 14, paragraph 1, of the Covenant to equality before the courts and to a fair hearing of his administrative case by a competent, independent and impartial tribunal.

5.2 The author further submits that the lack of competence, independence and impartiality of the State party's courts is also demonstrated by the manner in which his administrative case was examined by a judge of the Zheleznodorozhniy District Court of Gomel on 25 January 2002 (paras. 2.7 and 2.10 above) and by another judge of the same court on 23 July 2002 (paragraph 2.12 above). He recalls that none of his complaints to the Chairpersons of the Gomel Regional Court and of the Supreme Court have yielded any results.

5.3 As to the State party's claim that the author's political opinion was irrelevant to the court proceedings and was not taken into account (para. 4.2 above), he submits a short chronology of the events that preceded the search of the premises of Civil Initiatives on 13 August 2001, the seizure of computer equipment and the holding of him administratively responsible.

5.4 From 1996 onwards, the author was the Chairperson of Civil Initiatives, which brought together more than 300 citizens residing in the Gomel region who were actively involved in the monitoring of elections at all levels in the State party. Civil Initiatives was planning to dispatch some 300 independent observers to monitor the presidential elections that were scheduled for September 2001. All preparatory work was carried out on the premises of Civil Initiatives and the computer equipment seized was a key part of the monitoring process. The author argues that, on the eve of the elections (13 August 2001), the State party authorities searched the premises of Civil Initiatives and seized its equipment under the pretext of a criminal case that had nothing in common with the activities of the association in question. Shortly after, Civil Initiatives itself was dissolved by court order on the basis of the evidence obtained from the information saved on the computer equipment seized.⁴

5.5 The author refers to the letter of the First Deputy Chairperson of the Supreme Court of 30 December 2002, acknowledging that the author was held administratively responsible "taking into account his personal data" (para. 2.15 above), and concludes that the State party authorities violated his right, guaranteed under article 26 of the Covenant, to equal protection of the law against discrimination on grounds of his political opinion.

Further submissions from the State party and the author

6.1 On 23 May 2011, the Committee informed the State party that it had started the consideration of the present communication at its 101st session (14 March–1 April 2011). It noted that the communication appears to also raise issues under articles 19, 22 and 25 of the Covenant, although they have not been specifically invoked by the author. The Committee, therefore, decided to postpone the consideration of the communication in order to request the State party to provide further observations on the author's initial submission, taking into account the Committee's assessment that it also raised issues under articles 19, 22 and 25 of the Covenant.

⁴ Reference is made to communication No. 1274/2004, *Korneenko v. Belarus*, Views adopted on 31 October 2006.

6.2 On 25 January 2012, the State party submits, with regard to the present communication together with around sixty other communications that, when becoming a party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that recognition of competence is done in conjunction with other provisions of the Optional Protocol, including those that set criteria regarding petitioners and admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. It maintains that under the Optional Protocol the State parties have no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions, which "could only be efficient when done in accordance with the Vienna Convention of the Law on Treaties". It submits that "in relation to the complaint procedure the State Parties should be guided first and foremost by the provisions of the Optional Protocol" and that "references to the Committee's longstanding practice, methods of work, case law are not subject of the Optional Protocol". It further submits that "any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights will be viewed by the State party as incompatible with the Protocol and will be rejected without comments on the admissibility or on the merits". The State party further maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

7.1 On 21 March 2012, the author argues in great detail that, by becoming a party to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred.⁵ He adds that, therefore, the State party is obliged to give effect to the Committee's Views and to accept the Committee's standards, practices, methods of work and jurisprudence.

7.2 The author further submits that he did not appeal the decisions taken by the State party's courts in relation to his case to the prosecutorial authorities under the supervisory review procedure because, in line with the Committee's jurisprudence, complainants are required to exhaust domestic remedies that are not only available but also effective. In this regard, he notes that the Committee has previously concluded that the supervisory review procedure constituted an extraordinary means of appeal and was not a remedy, which had to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

The State party's failure to cooperate

8.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the author's communication, insofar as it is registered in violation of the provisions of the Optional Protocol; that it has no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions; and that decisions taken by the Committee on the present communication will be considered by its authorities as "invalid".

⁵ Reference is made to the Committee's general comment No. 33 (2008) on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V, paras. 11 and 13.

8.2 The Committee recalls that article 39, paragraph 2, of the Covenant authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.⁶ It is for the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and on the merits of the communications, the State party violates its obligations under article 1 of the Optional Protocol to the Covenant.

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the fact that the author has interpreted the State party's further submission of 25 January 2012 as challenging the admissibility of his communication on the ground of non-exhaustion of domestic remedies. The Committee notes the author's explanation that he had exhausted all available domestic remedies and that he has not lodged any complaint with the prosecutorial authorities, since the supervisory review procedure does not constitute an effective domestic remedy. The Committee also notes that the author submitted an appeal for supervisory review to the Supreme Court, which upheld the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2003. In this regard, the Committee recalls its jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.⁷ In the circumstances, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

9.4 With regard to the author's claim that his rights under article 14 of the Covenant were violated, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the

⁶ See communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

⁷ See, for example, communication No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.3; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; communication No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011, para. 8.3.

determination of criminal charges against individuals or of their rights and obligations in a suit at law. It recalls that criminal charges relate in principle to acts declared to be punishable under domestic criminal law.⁸ The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.⁹ In this respect, the Committee recalls that the concept of a “criminal charge” bears an autonomous meaning, independent of the categorizations employed by the national legal system of the States parties, and has to be understood within the meaning of the Covenant.¹⁰ The issue before the Committee is, therefore, whether article 14 of the Covenant is applicable in the present communication, that is, whether the sanctions in the author’s case concerned “any criminal charge” within the meaning of the Covenant, i.e., regardless of their qualification in domestic law.

9.5 As to the “purpose and character” of the sanctions, the Committee notes that, although administrative according to the State party’s law, the sanctions imposed on the author had the aim of repressing, through penalties, offences alleged against him and of serving as a deterrent for others. In the Committee’s view, this objective is analogous to the general purpose of criminal law. It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status — in the manner, for example, of disciplinary law — but towards everyone in his or her capacity as recipients of untied foreign aid in Belarus; they proscribe conduct of a certain kind and make its commission subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offences in question were, in terms of article 14 of the Covenant, criminal in nature. Consequently, the communication is admissible *ratione materiae*, insofar as the proceedings related to the use of foreign aid (computer equipment) for the preparation for and monitoring of the elections, fall within the ambit of “the determination” of a “criminal charge” under article 14, paragraph 1, of the Covenant.¹¹

9.6 The Committee further notes that the author’s claim under article 14, paragraph 1, of the Covenant concerns the manner in which the State party’s courts examined his administrative case, inter alia, in having based an administrative charge against him “on the evidence obtained in violation of law”. The Committee observes that these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.¹² In the present communication, the author has failed to demonstrate that, even if the seized computer equipment was not packed and sealed, contrary to the requirements of the State party’s own procedural law, the court’s findings in this respect reached the threshold of arbitrariness in the evaluation of the evidence or amounted to a denial of

⁸ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 15.

⁹ Ibid. See also communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

¹⁰ Communication No. 1311/2004, *Osiyuk v. Belarus*, Views adopted on 30 July 2009, para. 7.3.

¹¹ Ibid., paras. 7.4 and 7.5.

¹² See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.3; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; communication No. 886/1999, *Bandarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.3; communication No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6.

justice. Accordingly, the Committee considers that the author's allegations under article 14, paragraph 1 of the Covenant are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

9.7 As to the alleged violation of article 26 of the Covenant, in that the author was denied the right to equal protection of the law against discrimination, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

9.8 The Committee considers that the remaining part of the author's allegations, raising issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

10.2 There are three closely interlinked issues before the Committee. The first issue is whether the imposition of a fine on the author for the use by Civil Initiatives of the computer equipment, received as untied foreign aid, for the preparation for and monitoring of the elections, as well as the confiscation of the computer equipment in question, amounted to a restriction of the author's right to freedom of association, and whether such restriction was justified. The Committee notes that, according to the author, the computer equipment seized was a key part of the elections monitoring process carried out by Civil Initiatives and the evidence obtained from the information saved on the computer equipment seized served as a basis for the subsequent dissolution of Civil Initiatives by court order.¹³ In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association, but also guarantees the right of its members freely to carry out statutory activities of the association. The protection afforded by article 22 of the Covenant extends to all such activities, and any restrictions placed on the exercise of this right must satisfy the requirements of paragraph 2 of that provision. In the light of the fact that the seizure of the computer equipment and the imposition of a fine on the author effectively resulted in the termination of elections monitoring by Civil Initiatives, the Committee considers that they amount to a restriction of the author's right to freedom of association.

10.3 The Committee observes that, in accordance with article 22, paragraph 2, in order for the interference with the right to freedom of association to be justified, any restriction of this right must cumulatively meet the following conditions: (a) it must be provided for by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the Government or the majority of the population, is a cornerstone of a democratic society.¹⁴

10.4 The Committee notes that, in the present communication, the author was held responsible and the computer equipment of Civil Initiatives was confiscated under paragraph 5.3 and paragraph 4, part 3, of the Presidential Decree (see para. 2.5 above). The

¹³ Supra note 4.

¹⁴ Ibid., para. 7.3.

State party, however, has not advanced any arguments, despite having been given an opportunity to do so, as to why it would be *necessary*, for purposes of article 22, paragraph 2, to prohibit and penalize the use of such computer equipment “for the preparation for and conduct of the elections, referendums, recall of a deputy or of a member of the Council of the Republic, for the preparation of gatherings, meetings, street marches, demonstrations, pickets, strikes, the production and dissemination of politically charged material, as well as the organization of seminars and other forms of politically charged activities directed at the public at large”.

10.5 The Committee further notes that the activity for which the author was held responsible, namely, the use of computer equipment, received as untied foreign aid, for elections monitoring and related publicity activities falls within the scope of article 25, paragraph (a), of the Covenant, which recognizes and protects the right of every citizen to take part in the conduct of public affairs. In this regard, the Committee recalls its general comment No. 25 (1996) on article 25, according to which citizens take part in the conduct of public affairs, *inter alia*, by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.

10.6 The Committee further recalls that the rights protected by article 25 of the Covenant may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.¹⁵ In the light of its finding that the prohibition and penalization of the use of the computer equipment received as untied foreign aid for the preparation for and monitoring of the elections does not meet the requirement of necessity provided for in article 22, paragraph 2, of the Covenant, the Committee is of the view that the same provisions of the relevant domestic law can also be exploited to unreasonably restrict the rights protected by article 25, paragraph (a), of the Covenant.

10.7 The Committee also notes that the activity for which the author was held responsible, namely, the use of computer equipment, received as untied foreign aid, for elections monitoring and related publicity activities also falls within the scope of article 19, paragraph 2, of the Covenant, which *inter alia* guarantees freedom to seek, receive and impart information and ideas. The Committee then has to consider whether the respective restrictions imposed on the author are justified under article 19, paragraph 3, of the Covenant, i.e. are provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls in this respect its general comment No. 34, in which it stated *inter alia* that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.¹⁶ Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.¹⁷

10.8 The Committee observes that, in the present case, the State party has failed to invoke any specific grounds, despite having been given an opportunity to do so, on which the restrictions imposed on the author’s activity would be *necessary* for one of the legitimate

¹⁵ General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V, paras. 4 and 25.

¹⁶ See general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), paras. 2, 37 and 38.

¹⁷ *Ibid.*, para. 22.

purposes set out in article 19, paragraph 3, of the Covenant. The Committee recalls that it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party may introduce a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant.¹⁸ The Committee considers that, in the absence of any pertinent explanations from the State party, the restrictions of the exercise of the author's freedom to seek, receive and impart information and ideas, although permitted under domestic law, cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others.

10.9 In the light of the information before it, and in the absence of any pertinent explanations from the State party in this connection, the Committee concludes that the imposition of a fine on the author for the use by Civil Initiatives of the computer equipment, received as untied foreign aid, for the preparation for and monitoring of the elections and related publicity activities, as well as the confiscation of the computer equipment in question, violated the author's rights under article 22, paragraph 1, read in conjunction with article 19, paragraph 2, and also in conjunction with article 25, paragraph (a), of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of article 22, paragraph 1, read in conjunction with article 19, paragraph 2, and also in conjunction with article 25, paragraph (a), of the Covenant. The Committee reiterates its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the present value of the fine and any legal costs incurred by the author, return of the confiscated computer equipment or reimbursement of its present value, as well as compensation. The State party is also under an obligation to prevent similar violations in the future and should ensure that the impugned provisions of the Presidential Decree are made compatible with articles 19, 22 and 25 of the Covenant.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

¹⁸ See, communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

Appendix

Individual opinion by Committee members Mr. Gerald L. Neuman and Mr. Walter Kälin (concurring)

1. We agree in substance with the Committee's disposition of this case, but we write separately to address two issues tangential to its opinion, which we would have addressed slightly differently.

2. First, we would have found that the State party had violated article 22, paragraph 1, in conjunction with article 19, paragraph 2, and omitted the reference to article 25. We agree that article 25 is relevant, but discussing article 25 is not strictly necessary, and the discussion of article 25 in the opinion might mislead readers about the broader implications of the decision. The Committee invokes general comment No. 25 on article 25, and some of the generalities that citation prompts take us rather far afield from the context of the present case. This case is fundamentally about the monitoring of elections by civil society observers, and not about the conduct of election campaigns. As we understand it, the Committee is not taking a position one way or the other about the regulation of funding from foreign sources for campaign finance or political parties or advocacy of the election of particular candidates. These issues would deserve fuller discussion in a case that actually involved them.

3. Second, we would like to expand on why the violation concerns article 22 (freedom of association) "in conjunction with" article 19 (freedom of expression). The author was personally fined and equipment was confiscated from the association precisely because the equipment was used by the association in activities that are protected by article 19. Thus the author's exercise, in association with others, of the right to seek, receive and impart information and ideas provoked sanctions directed partly at the author and partly at the association. The Committee properly demands a high level of justification for this interference, and the State party has not supplied it.

4. Not every activity in which an association might engage would be as strongly protected by article 22, standing alone. The Committee has had relatively few opportunities to analyse the content of the right to freedom of association, mostly in cases involving the formation, registration, or dissolution of associations. The Committee says in paragraph 10.2 of its opinion, as it has said before, that article 22 protects the right of members of an association to carry out its statutory activities. Within limits, we agree. For instance, a State would interfere with freedom of association if it prohibited the members of an association from performing together acts that individuals are permitted to perform alone, and the interference would violate article 22 unless it were justified under article 22, paragraph 2. We do not think, however, that in a state that banned the consumption of alcohol (which we assume raises no issue under the Covenant), individuals could acquire an article 22 right to drink beer together merely by forming a beer-drinking club. The example is trivial, but it points to a question regarding the content of article 22 that the Committee may need to address in future cases.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**B. Communication No. 1303/2004, *Chiti v. Zambia*
(Views adopted on 26 July 2012, 105th session)***

<i>Submitted by:</i>	Joyce Nawila Chiti (not represented by counsel)
<i>Alleged victims:</i>	Jack Chiti, the author and their five children.
<i>State party:</i>	Zambia
<i>Date of communication:</i>	26 July 2004 (initial submission)
<i>Subject matter:</i>	Alleged torture, death penalty following unfair trial and forced eviction with no adequate remedy
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture, unfair trial, arbitrary arrest and detention; death penalty; right to privacy, to family and child protection; freedom of movement; and right to adequate remedy
<i>Articles of the Covenant:</i>	2, para. 3; 7; 9, para. 1; 10, para. 1; 12, para. 1; 14, para. 3 (c) and (g); 16; 17, paras. 1 and 2; 23, para. 1; 24, para. 1; and 26
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2012,

Having concluded its consideration of communication No. 1303/2004, submitted to the Human Rights Committee by Mrs. Joyce Nawila Chiti under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Joyce Nawila Chiti, a Zambian national, born in 1960 in Kitwe, Zambia. She submits her communication on her behalf as well as on behalf of her husband, Jack Chiti, born on 10 August 1953 in Kalulushi, Zambia, and their children. The author claims that Zambia has violated their rights under articles 2, paragraph 3; 7; 9, paragraph 1; 10, paragraph 1; 12, paragraph 1; 14, paragraph 3 (c) and (g); 16; 17,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

paragraphs 1 and 2; 23, paragraph 1; 24, paragraph 1; and 26¹ of the Covenant on Civil and Political Rights. She is not represented by counsel.²

1.2 On 20 October 2004, the Special Rapporteur on new communications and interim measures denied the State party's request for the Committee to examine the admissibility of the communication separately from the merits.

Factual background

2.1 On 28 October 1997, Mr. Chiti, who was a military officer, was arrested by the police as a suspect in an attempted coup d'état. He was charged with treason. He was detained in solitary confinement and held incommunicado and in fetters in the Zambian police headquarters for nine days. During this time, he was denied food and legal representation. In addition, from 28 October to 6 November 1997, each night from 19h00 to the following morning, he was subjected to the following treatment by 8 to 12 state security agents taking turns: regular hour-long beatings with hosepipes, electrical wires, wooden and rubber batons; made to stand on one leg for hours and when tried to shift to the other leg was beaten; repeated questioning by all policemen in the room at the same time, sometimes while lying on his stomach with policemen standing on him, and then repeated beatings; threatened with death and maiming; forced to sign statements implicating senior politicians in the alleged coup; suspended from a rope hanging from the ceiling; suspended on a rod having been "coiled" into a wheel, with a metal rod passed between his abdomen and his curled legs; threatened with drowning and being fed to crocodiles at the foot of a river, 50 km south of Lusaka; made to stand naked against the edge of a table whereupon his penis was hit with the sharp edge of a ruler.

2.2 As a consequence of the torture inflicted, Mr. Chiti was transferred to Maina Soko Military hospital in Lusaka where it appeared that his eardrum had been perforated. On 6 November 1997, Mr. Chiti was transferred to Lusaka Central Prison (Chimbokaila). On 10 November 1997, he was taken back to the police station headquarters where he was forced to make and sign a written statement implicating certain politicians in the alleged coup.

2.3 In the same month, Mr. Chiti made a complaint to the Government-appointed, -administered and -controlled Zambian Permanent Human Rights Commission. A group of human rights commissioners from this Commission tried to visit him in prison in November or December 1997, but prior to their arrival he was removed and hidden in another prison. He forwarded his complaint to the Legal Resources Foundation, a privately run law firm, which represented him in relation to his treason charge (see para. 2.7 below).

2.4 On 31 October 1997, two days after Mr. Chiti's arrest, soldiers, police officers and State security agents forced their way into the government flat in which the Chiti family was living. They took all the family belongings, loaded them on a military truck and drove to an unknown destination. No member of the family was in the house at the time, as the author was visiting her husband at the police headquarters. When trying to return home, the author and her children were barred from doing so. Almost all the family belongings, including important documents like birth and marriages certificates are either missing, were damaged or stolen. The author later found out that their belongings had been dumped at Lusaka's main city bus and railway station. She could not recover any of them.

¹ The author mentions the articles violated without relating them to a specific victim. The author usually speaks of the entire family as being the victim of violations of those provisions (see below in the Complaint).

² Both the Covenant and the Optional Protocol thereto entered into force for Zambia on 9 July 1984.

2.5 Subsequently, on six occasions, the author and her children were forcibly and illegally evicted by State security agents from six homes in which they attempted to seek shelter. According to the author, they were victimized, harassed and intimidated, denied freedom of movement and assembly. The author's children could not go to school any more due to fear of harassment. In November 1998, the author and her three youngest children fled Zambia to seek political asylum in Namibia. They stayed there until October 1999. Since their return, the State party has continued to harass them. As a result, they are homeless and destitute and the education of the author's children has been greatly disrupted.

2.6 The State party established a Commission of Inquiry to investigate alleged torture by its agents of those having been suspected of involvement in the coup. The author or her husband never received a copy of the Commission's report but were told verbally that those responsible for the torture described by Mr. Chiti in paragraph 2.1 above were identified as State agents. The report recommended that the State party pay compensation to the family.

2.7 In the meantime, in 1998, the Legal Resources Foundation sued the State party on behalf of Jack Chiti. The court found in his favour and ruled that Mr. Chiti, the author and their children be awarded compensation for the illegal eviction from their home and loss and damage of personal effects as well as compensation to Mr. Jack Chiti for the torture suffered.

2.8 Despite the recommendations made by the Commission of Inquiry as well as the ruling from the Court, the State party refused to pay the compensation.

2.9 Mr. Chiti's trial suffered unnecessary delays with hearings being often postponed. He was convicted of treason and sentenced to death by hanging. Subsequently, his death sentence was cancelled, having been pardoned by the Zambian President.³ While imprisoned, he was diagnosed with prostate cancer but could not afford the prescribed drugs. The prison in which he was serving his sentence failed to provide him with these drugs. Neither was he provided with the high-protein diet recommended for the purposes of slowing down the spread of cancer. He was HIV-positive and was detained in inhuman conditions, denied adequate food, a clean environment and counselling.

2.10 In December 1998, the author with her three youngest children sought asylum in Namibia. They lived at Osire refugee camp for one year in dire conditions. The author came back to Zambia due to her husband's illness. In September 2002, the author was informed of the worsening of her husband's health situation. He was hospitalized at Kabwe general hospital. Despite several requests, the hospital refused to transfer Mr. Chiti to Lusaka where all the author's children had stayed.

2.11 The author's husband was pardoned by the Zambian President and released on humanitarian grounds due to his poor health in June 2004. He died on 18 August 2004.

The complaint

3.1 The author claims that Zambia has violated her rights as well as the rights of her husband, Jack Chiti, and those of her children under articles 2, paragraph 3; 7; 9, paragraph 1; 10, paragraph 1; 12, paragraph 1; 14, paragraph 3 (c) and (g); 16; 17, paragraphs 1 and 2; 23, paragraph 1; 24, paragraph 1; and 26 of the Covenant.⁴

³ The quashing of the sentence occurred at the end of June 2004.

⁴ The author limits herself to listing the rights which have been allegedly violated without making the link with the specific facts outlined in the factual background.

3.2 Although it has not been explicitly raised by the author, the communication appears to raise issues under article 6, paragraph 1, of the Covenant.

State party's observations on admissibility

4.1 On 11 November 2004, the State party challenged the admissibility of the communication on grounds of non-exhaustion of domestic remedies. The State party argues that after the submission of the initial communication, Jack Chiti passed away and the matter raised in the communication is still pending before national courts.

4.2 In a note verbale dated 8 February 2005, the State party stated that neither Mr. Chiti nor the author or their children had exhausted domestic remedies fully available to them. The State party notes that Mr. Chiti's case is defended by a counsel before national courts.

4.3 The State party denies that the author's death was in any way a consequence of the alleged torture. It also denies having failed to implement court orders on compensation to any of the Chiti family.

4.4 With regard to the Commission of Inquiry, the State party notes that the rejection of the Commission's findings by the Government resulted from a Cabinet decision based on the fact that those who had allegedly tortured Mr. Chiti were not heard by the Commission. However, this rejection does not ouster the jurisdiction of the Zambian courts to decide on all issues raised in the communication.

4.5 On 10 October 2005, the State party informed the Committee that it had entered into negotiations with the author and her family in order to resolve the matter. The State party adds that the author has entered into those negotiations willingly and that the outcome of the negotiations will be communicated to the Committee as soon as they reach a final conclusion.

Further submissions from the parties

5.1 On 7 March 2006, the author, through her sister, informed the Committee that she lived outside the territory of the State party and has therefore entrusted her sister to receive the compensation ordered by the court.⁵ Despite several attempts, her sister was denied the payment of that compensation. Despite the fact that the compensation sought covered both the torture inflicted and the loss of property, the State has only agreed to pay compensation for property loss for a total amount of US\$ 6,600.

5.2 The author submits a newspaper article stating that Mr. Chiti was released from prison on 21 June 2004 for medical reasons as he was suffering from cancer which confined him to a wheelchair.

6. On 8 February 2007, the State party informed the Committee that it had successfully concluded the negotiations with the author. On 22 September 2005, the author accepted in writing an offer of K 20 million in Zambian kwachas⁶ as final settlement from the State party to compensate the author and her family for their torture claim.⁷ The Ministry of Justice wrote to the Ministry of Finance and directed it to pay the said amount to the author as beneficiary and benefactor of the Chiti family.⁸

⁵ See above, paras. 2.6 and 2.7.

⁶ This amount corresponded to US\$ 3,780.36 at the time of consideration of the communication.

⁷ The State party refers to the author's letter to the Ministry of Justice dated 22 September 2005.

⁸ The State party provides a copy of the author's letter to the Government of Zambia agreeing to the said amount as compensation. The State party also annexes to its observations the letter sent by the Ministry of Justice to the Ministry of Finance.

7. On 9 May 2008, the author informed the Committee that when the State party informed her of the final amount to which she was entitled as compensation for the torture inflicted to her husband, she did not agree to it and sent a fax to the Ministry of Justice to inform the State party of her decision. However, her decision was not accepted and she was instructed by a State representative to accept the amount proposed as final payment. The author considers that the amount proposed is too little compared to the suffering her husband went through as a result of torture.

Author's comments to the State party's observations

8.1 On 1 February 2010, the author reiterates that the State party violated her husband's rights, as he suffered physical torture following his arrest on 28 October 1997. In addition, she and her children suffered mental harm as a consequence of the torture her husband went through as well as material damage linked to the destruction of their belongings. The author contends that the amount of compensation paid corresponds to a small fraction of the loss suffered, which the author finally accepted out of despair because she was destitute.

8.2 Following the eviction, the author went to live with her sister. However, after a few days, she and her sister were also evicted from her sister's home. The State authorities clearly mentioned that the eviction of the author's sister from her home was related to her hosting the author. From that moment, the author moved from one house to another, in fear of being again evicted.

8.3 As the children carried their father's family name, they were denied registration at school. The author considers that she and her children were deprived of a normal life. Furthermore, she was unable to find an employment, which consequently left her destitute.

State party's further submission on admissibility

9.1 On 3 March 2011, the State party contends that contrary to the author's comments, the case is still being considered by the Government. The State party considers that there is no evidence to show that it has not been responding to the author's demands. There is evidence that, in 2006, the Government paid K 20 million in an attempt to settle this matter, which the author does not dispute. The State party concludes that adequate remedies are at the author's disposal, which she did not exhaust. Since the submission of her communication to the Committee, the author has been constantly outside the State party's jurisdiction and as such has made it extremely difficult for the Government to conclude the matter. The State party mentions its attachment to resolving the author's claim efficiently and through "mutual understanding".

9.2 The State party refers to a letter of the Ministry of Justice dated 14 December 2006 in which it states that the author had not yet presented herself to the Ministry of Finance to endorse the amount of the compensation due to her absence of the State party's territory.

Absence of State party's additional observations on the merits

10. In notes verbales dated 8 March 2005 and 24 May 2005, the State party was requested to provide additional information to the Committee on the merits of the communication. Following the author's decision not to agree to the amount of the compensation offered by the State party, the Committee set a new deadline to the State party to submit observations on the merits to 25 August 2010. Despite three reminders dated 13 October and 23 December 2010 and 1 March 2011, the State party did not provide its observations.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether it is admissible under the Optional Protocol to the Covenant.

11.2 While observing the considerable delay in receiving information from the author following registration of the communication, the Committee nevertheless considers that, given the particular circumstances of the case, it is not precluded from considering the present communication.

11.3 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

11.4 With regard to the requirements under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes the State party's argument that the matter raised in the communication is still pending before national courts. The Committee also notes the State party's argument that following the submission of the communication, the State party entered into negotiations with the author for a friendly settlement; and that on 22 September 2005, the author accepted in writing an offer of K 20 million as final settlement from the State party. The Committee notes the author's claim that she was compelled to accept such amount due to her dire situation but that it is not commensurate to the loss and damage caused both in terms of the torture inflicted to Jack Chiti and the material damage caused as a consequence of their eviction from the flat that the family occupied. The Committee further notes the author's claim that her husband filed a complaint with the Zambian Permanent Human Rights Commission and that the Legal Resources Foundation sued the State party on his behalf. As a result, the court ruled that Mr. Chiti, the author and their children be awarded compensation for the illegal evictions from their home and loss and damage of personal effects as well as compensation to Mr. Jack Chiti for the torture suffered. This compensation as ordered by the Court has not been paid by the State party. The Committee notes that the State party does not deny that the payment has not been made.

11.5 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the authors.⁹ The Committee also recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly violations of the prohibition of torture, but also to prosecute, try and punish anyone held to be responsible for such violations.¹⁰ In the present case, the information before the Committee indicates that, almost 16 years after the incriminated facts, the State party has still not launched any investigation into the allegations of torture and eviction and has limited itself to propose to the author a sum of money in the context of a friendly settlement. Moreover, with regard to the claims other than those related to torture, the State party has not provided information to the Committee on the judicial remedies de facto available to the author. Thus, the Committee considers that the

⁹ Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

¹⁰ Communication No. 1755/2008, *El Hagog Jumaa v. Libya*, Views adopted on 19 March 2012, para. 8.5.

application of the remedies is unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol and that it is not precluded from examining the communication on this ground.

11.6 Although the author does not elaborate and provide arguments in support of each of the articles invoked, the facts as she presented them seem to raise issues in relation to articles 2, paragraph 3; 7; 10; and 14, paragraph 3 (g), in relation to Jack Chiti who was arrested, allegedly tortured by state agents and forced to sign a confession. With regard to the author's allegation that following his arrest, her husband was held in solitary confinement and incommunicado for nine days, the Committee notes that no information has been provided on the arrest and whether he was presented before a judicial authority. On the other hand, the author states that on 31 October 1997, she visited her husband at Lusaka police headquarters.¹¹ The Committee therefore concludes that the author has not sufficiently substantiated her claims under articles 9 and 16. With regard to the author's allegation that Mr. Chiti's trial suffered undue delay, the Committee notes that the information provided is very general and does not contain indications as to the circumstances under which the trial took place. Accordingly, the Committee considers this part of the communication inadmissible under article 2 of the Optional Protocol. While the author has not specifically invoked article 6 of the Covenant, her allegations in relation to the direct link between her husband's treatment in detention and his subsequent death seem to raise issues under article 6 of the Covenant.

11.7 With regard to the author's allegations under articles 2, paragraph 3; 7; 12, paragraph 1; 17, paragraphs 1 and 2; 23, paragraph 1; 24, paragraph 1; and 26, they seem to relate to the author and her family. The Committee notes that the author has not provided the complete identity and age of her children and no power of attorney has been provided in the event that her children were above 18 years of age at the time of the submission of the author's communication. The Committee will therefore not separately examine the author's claims as related to her children, in particular in relation to article 24, paragraph 1, of the Covenant. With regard to article 12, paragraph 1, since the author has on several occasions left the country and come back, the Committee finds the author's allegations under article 12, paragraph 1, as insufficiently substantiated for purposes of admissibility. As for article 26, the author has not provided any information on alleged discrimination by the State party. This part of the communication is therefore also inadmissible under article 2 of the Optional Protocol. On the other hand, the Committee considers that the author's claims under articles 2, paragraph 3; 7; 17; and 23, paragraph 1, in relation to the disruption of her family life and the anguish and lack of remedy for the torture, detention and subsequent death of her husband have been sufficiently substantiated for purposes of admissibility.

11.8 The Committee therefore considers the communication admissible in relation to articles 2, paragraph 3; 6; 7; 10; and 14, paragraph 3 (g) of the Covenant with regard to Jack Chiti; and in relation to articles 2, paragraph 3; 7; 17; and 23, paragraph 1 of the Covenant with regard to the author and her family; and proceeds to the examination of those claims on the merits.

Consideration of the merits

12.1 The Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

¹¹ See paragraph 2.4 above.

12.2 The Committee notes the author's allegation that her husband, Jack Chiti, was tortured at the Lusaka police headquarters for nine days, following his arrest on 28 October 1997; that as a consequence of the torture inflicted, he was transferred to Maina Soko Military hospital where he was diagnosed with an eardrum perforation. The Committee further notes the author's claim that, while imprisoned, her husband was diagnosed with prostate cancer but could not afford the prescribed drugs; that the prison in which he was serving his sentence failed to provide him with these drugs; nor was he provided with the high-protein diet recommended for the purposes of slowing down the spread of cancer. The Committee also notes that Mr. Chiti was HIV-positive and that he was allegedly detained in inhuman conditions, denied adequate food and a clean environment. The Committee notes in this regard that according to the author, these inhuman conditions of detention led to Mr. Chiti's premature death. In the light of his cancer and his HIV-positive condition, the denial of the necessary drugs and the torture and inhuman conditions of detention to which he was subjected, this claim seems plausible. The Committee notes that the State party limits itself to denying the causal link established by the author between the conditions of detention of her husband and his death, without providing further explanation. In the absence of rebuttal from the State party, the Committee concludes that the State party has failed to protect the life of Mr. Chiti in violation of article 6 of the Covenant.

12.3 On the basis of the information available to it, the Committee further concludes that the torture inflicted on Jack Chiti, his poor conditions of detention with no adequate access to health care, the anguish he remained in for seven years before his sentence to death was quashed as well as the absence of a prompt, thorough and impartial investigation of the facts constitute a violation of article 7, alone and read in conjunction with article 2, paragraph 3, of the Covenant.

12.4 The Committee also takes note of the anguish and distress caused by the arrest, allegations of torture, poor conditions of the author's husband and the eviction from their home. It considers that the facts before it reveal a violation of article 7 of the Covenant with regard to author and her family.¹²

12.5 Having come to this conclusion, the Committee will not address the author's separate allegations under article 10 of the Covenant.¹³

12.6 With regard to the author's allegation that her husband's rights under article 14, paragraph 3 (g), have been violated, the Committee notes the author's contention that on 10 November 1997, her husband was taken back to the police station headquarters where he had been allegedly tortured for nine days, and was forced to make a written statement implicating certain politicians in the alleged coup and sign the document. The Committee notes that the State party has not refuted this claim. The Committee recalls its general comment No. 32 on article 14 in which it insists that the right not to testify against oneself must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law

¹² Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.6; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.7.

¹³ Communication No. 1755/2008, *El Hagog Jumaa v. Libya*, para. 8.7; communication No. 1880/2009, *Nenova et al. v. Libya*, Views adopted on 20 March 2012, para. 7.7; communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.8.

must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will. In light of the information before it, the Committee concludes to a violation of Mr. Chiti's rights under article 14, paragraph 3 (g), of the Covenant.

12.7 The Committee notes the author's allegation that, on 31 October 1997, soldiers, police officers and State security agents forced their way into the government flat the Chiti family was living in and took away all the family belongings. The Committee notes the author's claim that all the belongings, including important official documents are either missing, were damaged or stolen; and that the author and her children were prevented from returning to the government flat. Subsequently, on six occasions, the author and her children were allegedly forcibly and illegally evicted by State security agents from six homes in which they attempted to seek shelter. The Committee notes that this part of the claim is not refuted by the State party. The Committee also notes the author's allegation that a court ruled in her favour that compensation be awarded to them for the illegal eviction from their home and loss and damage of personal effects. The Committee notes that the existence of the court ruling has not been disputed by the State party and that to date, the amount set by the court has not be attributed to the author.

12.8 In light of the information available to it, the Committee finds that the author's illegal eviction and the destruction of the family's personal belongings has had significant impact on the author's family life¹⁴ and constitutes an infringement on her family's rights under articles 17 and 23, paragraph 1, of the Covenant, for which no effective redress was provided. The Committee concludes that the Chiti family's eviction and destruction of belongings amount to a violation of articles 17 and 23 read alone and in conjunction with article 2, paragraph 3, of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 6; article 7 alone and read in conjunction with article 2, paragraph 3; article 14, paragraph 3 g); and articles 17 and 23, paragraph 1, read alone and in conjunction with article 2, paragraph 3 of the Covenant.

14. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy, including (a) a thorough and effective investigation into her husband's torture suffered in detention; (b) providing the author with detailed information on the results of its investigations; (c) prosecuting, trying, and punishing those responsible for the torture; and (d) appropriate compensation for all the violations of the author's rights as well as the rights of her husband. The State party is also under an obligation to take measures to prevent similar violations in the future.

15. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's

¹⁴ Communication No. 1799/2008, *Georgopoulos et al. v. Greece*, Views adopted on 29 July 2010, para. 7.3.

Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**C. Communication No. 1548/2007, *Kholodova v. Russian Federation*
(Views adopted on 1 November 2012, 106th session)***

<i>Submitted by:</i>	Zoya Kholodova (represented by counsel)
<i>Alleged victim:</i>	The author's son, Dmitrii Kholodov (deceased)
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	5 December 2006 (initial submission)
<i>Subject matter:</i>	Death of a journalist in an explosion; unfair trial
<i>Procedural issue:</i>	Substantiation of claim
<i>Substantive issues:</i>	Right to life; fair trial; freedom of expression
<i>Articles of the Covenant:</i>	2; 6; 14; 19
<i>Article of the Optional Protocol:</i>	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2012,

Having concluded its consideration of communication No. 1548/2007, submitted to the Human Rights Committee by Zoya Kholodova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Zoya Kholodova, a Russian national born in 1937.¹ She submits the communication on behalf of herself and her son, Dmitrii Kholodov, a Russian national deceased in 1994. She claims violation by the State party of her rights under article 2, paragraph 3, and article 14, paragraph 1, of the International Covenant on Civil and Political Rights, as well as violation of her son's rights under article 6, paragraph 1, and article 19 of the Covenant. The Optional Protocol entered into force for the State party on 1 January 1992. The author is represented by counsels K. Moskalenko and M. Rachkovskiy.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin, and Ms. Margo Waterval.

¹ The initial submission was co-authored by Yuri Kholodov, father of Dmitrii Kholodov. On 26 April 2011, the author's counsel informed the Committee that Yuri Kholodov had passed away.

The facts as submitted by the author

2.1 The author's son, Dmitrii Kholodov, worked as a journalist at the newspaper *Moskovsky Komsomolets*. On 17 October 1994, a briefcase exploded in the newspaper's premises, killing Mr. Kholodov and injuring others. The author contends that the explosion was aimed at stopping her son's work of reporting on irregularities, including corruption, in the army.

2.2 On 17 October 1994, the Presnensk inter-district Prosecutor's Office initiated a criminal case in connection with the explosion. On 18 October 1994, in the light of the particular gravity and importance of the crime, a Deputy Prosecutor-General of the Russian Federation decided to entrust the General Prosecutor's Office with the investigation.

2.3 In the course of the investigation, five military officers and a civilian were identified as suspects for having organized the bombing, presumably acting on the orders of high-level military officials at the direct request of the Minister of Defence. The investigators concluded that the military officials had stolen explosives from their military unit and hidden an explosive device in a briefcase which was later provided to the author's son as containing sensitive information. The author's son died when opening the briefcase in his office, and other individuals in the newspaper's office were injured.

2.4 The criminal case was initially examined by the Moscow Regional Military Court starting in November 2000.² The court ordered a number of complementary expert examinations by medical-forensic, explosive device teams, among others, whose results differed from those made during the preliminary investigation. In particular, the latest conclusions showed that the amount of explosive used was not as large as initially stated, and the epicentre of the explosion was said to have been different. The author claims that the experts who carried out the second set of examinations were divided, and their conclusions differed from those reached following the examinations carried out during the preliminary investigation. The author contends that the conclusions of the first expert examination were more appropriate.

2.5 On 26 June 2002, the Moscow Regional Military Court acquitted the six accused and ordered their immediate release.³ The prosecution as well as the author appealed to the Military College of the Supreme Court of the Russian Federation. On 27 May 2003, the Supreme Court quashed the 26 June 2002 sentence of the Moscow Regional Military Court and referred the case back to the same court for a new examination, but with a different composition.

2.6 The second court trial took place from July 2003 to June 2004. According to the author, the court examined the different conclusions of the expert examinations ordered during the first trial. The author claims that during the second trial, the transcript of the first trial was studied, but the annotations made on it were not taken into account.

2.7 On 10 June 2004, the Moscow Regional Military Court again acquitted the accused of the explosion. The prosecution and the author appealed again to the Supreme Court,⁴ claiming that the court started the trial in the absence of some parties; did not clarify all the contradictions subsisting in a number of witness depositions; nor did it interrogate one important witness nor read out the annotations made on the transcript of the first trial when examining it, and therefore retained inadmissible evidence.

² The author did not provide details about the preliminary investigation carried out between 1994 and 2000.

³ The author did not provide details on the exact date of arrest of the accused.

⁴ The author's appeal was submitted on 18 June 2004.

2.8 On 14 March 2005, the Military College of the Supreme Court confirmed the acquittal decision by the Moscow Regional Military Court. The author requested the Presidium of the Supreme Court to have the case re-examined under supervisory proceedings. On 25 April 2005, the Presidium of the Supreme Court rejected the request to order the examination of the case under supervisory proceedings.

2.9 The author claims that the court trials suffered a number of procedural irregularities.⁵ She refers to public criticism by the Minister of Defence of her son's publications, which, in her view, shows that her son was a victim of the actions of high-level officials in the army. She maintains that the courts did not take account of the testimonies of one witness who had affirmed during the preliminary investigation that, shortly before the crime, he had seen a suitcase with an explosive device in it on the desk of one of the military personnel accused of the murder, and who had also claimed that he had seen several of the accused leaving their military unit together in the morning preceding the explosion.⁶ The investigator who interrogated this witness initially was not called to court for questioning, in spite of the author's requests. The author also claims that the conclusions of the courts were contradictory and not supported by the evidence examined during the trial. In addition, five out of the six accused in the first trial were military personnel and the case was examined by a military court, which resulted in a biased decision.

2.10 Referring to the Committee's jurisprudence,⁷ the author contends that the criminal proceedings in this case suffered undue delay. According to her, the trial was unfair because although the first instance court concluded that the explosion in the newspaper's premises was due to the activation of an explosive device, it acquitted the accused. She also challenges the conclusions of several experts and the courts' assessments of the conclusions and claims that the courts used unreliable evidence and failed to provide any legal assessment on a number of points at issue.⁸

2.11 The author states that domestic remedies have been exhausted.

The complaint

3.1 The author claims that her son was murdered while performing his professional duties as a journalist. In her opinion, the crime was politically motivated and high-ranking officials had an interest in not having it elucidated. Thus, the officials in question prevented the case from being dealt with diligently; the preliminary investigation lasted six years.

⁵ The author claims, for example, that when examining the case for a second time in 2004, the Moscow Regional Military Court referred to the trial transcript of the previous (2000–2002) trial, without reading the annotations. She claims that the presiding judge on the second examination of the case was a subordinate to the first presiding judge. She also explains that the court wrongly retained the conclusions of a complex expert examination on the quantity of explosives used.

⁶ It transpires from the material on file, however, that the witness in question subsequently retracted his initial testimonies, claiming that he had initially given them in an investigation detention centre when he was suffering from a serious disease and was not in his normal state. He said that the investigator had put him under pressure and forced him to acquiesce to certain theses, and the interrogations had to stop on numerous occasions due to his health conditions. The courts decided to retain the witnesses' subsequent testimonies, as they were in line with the depositions of a multitude of other witnesses and persons, and other corroborating evidence.

⁷ The author refers to the Committee's decision in communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988.

⁸ The author further explains that the first instance court, when examining the case for the second time, failed to provide a legal assessment of the statements made in public by the Minister of Defence concerning her son.

According to the author, the State party is responsible for the arbitrary deprivation of her son's life. She claims that the authorities failed, not only in their duty to effectively protect the life of her son, but also in not ensuring that an effective investigation was conducted by an impartial organ into the killing of her son, and not prosecuting and sanctioning those responsible for his death, in violation of article 6, paragraph 1, and article 2, paragraph 3, of the International Covenant on Civil and Political Rights.⁹

3.2 The author claims to be a victim of a violation of article 14, paragraph 1, of the Covenant, as the proceedings were initiated on 17 October 1994, but the last court decision — the ruling of the Supreme Court — was handed down on 14 March 2005, i.e. almost nine and a half years later. She contends that the trial was biased as it was held before a military court, even though five of the accused were military officers and it was a criminal case. She considers that the murder of a journalist in a democratic State supposes special attention by the authorities and an exhaustive and impartial investigation, and claims that this was not respected in the present case. She invokes a number of irregularities, allegedly committed by the courts in relation to the criminal procedure law (see paras. 2.9–2.10 above). In this respect, the author claims that the fact that no perpetrators were identified prevents her from receiving compensation for the loss of her son, in violation of article 2, paragraph 3, of the Covenant.

3.3 The author claims that her son was killed because of his work as a journalist and as a consequence of his publications on problems in the army and the existence of corrupt practices among high-ranking army officials. According to her, the murder aimed at protecting representatives of the army and resulted in a limitation of her son's right to freedom of expression, in particular his freedom to express opinions and to disseminate information, in violation of article 19 of the Covenant.

State party's observations on admissibility

4.1 By note verbale of 16 May 2007, the State party explained that the author challenges the effectiveness of the investigation concerning the death of her son, as well as the effectiveness of the court proceedings in the case. The State party adds that the author considers that the law-enforcement authorities have either failed or refused to carry out an effective inquiry into the circumstances of the death of her son, and they have failed to discover those responsible, whereas the courts have de facto failed in their duty to administer justice.

4.2 The State party explains that the criminal case concerning the killing of Mr. Kholodov was examined by the competent judicial authorities of the Russian Federation, in strict compliance with the law. The case was examined twice by courts of first and second instance: on 26 June 2002, the Moscow Regional (Circuit) Military Court acquitted the accused, Mssrs. Barkovsky, Kapuntsov, Mirzayants, Morozov, Popovskikh and Soroka, as their involvement in the killing of Mr. Kholodov could not be established. On 2 December 2002, the author appealed this decision in the Supreme Court with a request to annul the judgement and refer the case back to the court for new examination. On 27 March 2003, the Supreme Court annulled the decision of 26 June 2002, and sent the case back for new examination by another composition of the Moscow Regional Military Court.

4.3 On 10 June 2004, the Moscow Regional Military Court again acquitted the accused. The court transmitted the criminal case concerning the bombing in the newspaper's premises and the death of Mr. Kholodov to the General Prosecutor's Office, with a request

⁹ In this context, the author claims that by not identifying the persons responsible for the explosion, the authorities prevented her from seeking monetary compensation for damages suffered, in violation of article 2, paragraph 3, of the Covenant.

to carry out an investigation in order to establish who was responsible. All case materials and evidence were transmitted to the General Prosecutor's Office.

4.4 On 18 June 2004, the author filed a cassation appeal with the Supreme Court of the Russian Federation, asking to have the decision of the Moscow Regional Military Court of 10 June 2004 annulled and submitted an additional appeal on 14 December 2004. On 14 March 2005, the Supreme Court rejected the appeal and confirmed the sentence of 10 June 2004. On 31 March 2005, the author appealed both decisions under the supervisory review procedure to the Presidium of the Supreme Court, claiming that both decisions were handed down in violation of the Criminal Procedure Code. On 25 April 2005, the Presidium of the Supreme Court rejected the author's appeal.

4.5 The State party explains that by that time, the criminal case concerning the bombing and the death of the author's son was under investigation by the General Prosecutor's Office. The State party considers that the requirement of exhaustion of domestic remedies has not been fulfilled and the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. The State party rejects the author's allegation that the authorities do not have the will to investigate the case effectively, stating that it is groundless.

Author's comments on the State party's observations

5.1 On 30 July 2007, the author notes that the State party has not adduced any evidence in support of its contention that the criminal case has been investigated effectively. In her view, even if the investigation were to end with the identification of suspects and ultimate recognition of their guilt, she would still be a victim due to the delays in carrying out the criminal proceedings. In addition, there are no guarantees that the sentence would not be quashed later on, which would result in further and indeterminate delays. The author therefore considers that in the circumstances, nothing prevents the Committee from examining the communication.

5.2 The author further notes that the State party's submission implies that the delays in the proceedings are imputable to her own actions. She contends that in reality, in addition to her claims, the Supreme Court also received cassation appeals from the General Prosecutor's Office, the Moscow Prosecutor's Office and the Head Military Prosecutor's Office against the acquittal decision of the Moscow Regional Military Court. Furthermore, the Supreme Court has examined lower court decisions on two occasions.

5.3 The author further contends that the authorities' position on the criminal case is not related to the circumstances of the investigation of the case. As such, the criminal case was initiated by the Presnensk inter-district Prosecutor's Office on 17 October 1994, i.e., more than 12 years prior to the submission of the communication, and no final court decision has been rendered. For 10 years, the investigators focused on only one version of the events, which was ultimately rejected by the courts as erroneous.

5.4 The author notes that as of the opening of the criminal case up to the acquittal decision on 18 June 2004, the General Prosecutor's Office constantly insisted that the accused persons in the case were responsible for both the explosion on the newspaper's premises and the murder of the author's son. She also believes that a new examination of the case would most probably not have a positive outcome, due to the time elapsed.

5.5 The author further explains that by that time, a new investigation was pending by the General Prosecutor's Office, but that she was not informed of any movement in the case. This led her to the conclusion that the authorities have again failed in their duties and the investigation remains ineffective. The authorities have also failed in their duty to provide the victim with effective access to the investigation.

5.6 Finally, the author contends that the State party has failed to refute her allegations in any way.

Additional observations by the State party

6.1 On 29 December 2007, the State party reiterates that according to article 5, paragraph 2 (b), of the Optional Protocol, the Committee shall not consider any communication from an individual before ascertaining that all available domestic remedies have been exhausted. It states that at the time, the preliminary investigation concerning the murder of Mr. Kholodov was ongoing. Investigation activities were being carried out with the aim of identifying those responsible, and active measures were taken to elucidate the crime. Thus, domestic remedies have not been exhausted.

6.2 The State party notes that on 14 September 2006, the European Court of Human Rights declared the application submitted by the author inadmissible.

6.3 The State party further notes that in her comments, the author has not specified which of her rights have been violated by the authorities. In substance, her contentions relate only to the non-effectiveness and the delays in the investigation and court proceedings. In the State party's view, her allegation that the investigation was unjustifiably delayed does not correspond to the reality. The State party emphasizes that the preliminary investigation and the court trial were held in conformity with the criminal procedure law, and notes that the delays occurred for objective reasons and do not show that the authorities do not wish to effectively investigate the circumstances of the crime.

6.4 The State party adds that the General Prosecutor's Office is empowered by the criminal procedure law to file a cassation appeal against acquittal sentences, if it considers that the court decision was unlawful or groundless. Therefore, the author's allegation that the occurrence of such appeal in the present criminal case would negatively affect further investigation is frivolous.

6.5 The State party further contends that the allegation that the author has no access to the current investigation and that therefore demonstrates its ineffectiveness is groundless. The Criminal Procedure Code specifically regulates the manner in which injured parties are informed both of the criminal case material and of the outcome of the investigation. Article 125 of the Criminal Procedure Code allows for appeals in court against acts or omissions by the officials in charge of the preliminary investigation. The material on file does not permit the conclusion that the author has complained to the courts subsequent to the latest transmittal of the criminal case to the General Prosecutor's Office.

6.6 The State party adds that the allegations on the possible acquittal of suspects, if identified, is a hypothetical one and cannot be taken into account in assessing the issue of an unjustified delay in the present case. In the light of all these elements, the State party considers that the delay in the investigation and in the examination of the criminal case cannot be considered as undue. It adds that the criminal investigation was still open and that it was prolonged until 15 December 2007, under the supervision of the General Prosecutor's Office.

Author's comments on the State party's submission

7.1 On 14 March 2008, the author notes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol does not apply where the application of the domestic remedies is unreasonably prolonged. She notes that as at that time, 13 years had elapsed, during which the authorities had allegedly taken active steps to resolve the criminal case.

7.2 As to the decision of the European Court of Human Rights of 14 September 2006, the author contends that the Court based its inadmissibility decision on the grounds that the

murder of Mr. Kholodov had taken place prior to the entry into force of the European Convention of Human Rights and Fundamental Freedoms for the State party, and not on the grounds of failure to exhaust domestic remedies.

7.3 Regarding the State party's contention that in her submission, she did not specify which of her rights under the Covenant were violated, the author explains that her initial submission to the Committee includes the specific articles and argumentation thereon.

7.4 Finally, on the issue of the appeals under article 125 of the Criminal Procedure Code, the author explains that in the light of the length of the criminal proceedings, such an appeal would clearly be ineffective.

Additional information by the State party

8.1 On 2 August 2011, the State party recalls the chronology of the investigation and court proceedings in the criminal case and states that on 30 October 2006, the file material of the criminal case was brought to the General Prosecutor's Office for a new investigation. On 15 December 2008, the preliminary investigation was closed, as no suspects could be identified. On the recommendation of the investigator, the operative search organs continued to carry out actions aiming at identifying the persons responsible for the crime.

8.2 According to the State party, the analysis of the criminal case, which is composed of 298 files, permits the conclusion that all possible investigation activities have been carried out, exhaustively. The investigation of the criminal case could only resume on the basis of new information. The State party also notes that as of September 2007, the author has not sought any information from the Head Investigation Office of the Investigation Committee of the Russian Federation about the investigation.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under any other procedure of international investigation or settlement.

9.3 On the issue of exhaustion of domestic remedies, the Committee notes the State party's contention that the case should be declared inadmissible as a new investigation was ongoing at the time the communication was submitted. However, the Committee notes that at present, the investigation in question is closed.¹⁰ In the circumstances, the Committee considers that it is not precluded by the requirement of article 5, paragraph 2 (b), of the Optional Protocol from considering the present communication.

¹⁰ See paragraph 8.1 above.

9.4 The Committee considers that the author's allegations concerning issues under article 2, paragraph 3; article 6, paragraph 1; article 14, paragraph 1, and article 19, of the International Covenant on Civil and Political Rights have been sufficiently substantiated for purposes of admissibility, and therefore proceeds with its examination of the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has taken note of the author's allegation that the State party's authorities failed to conduct an effective and timely investigation into the exact circumstances of her son's death and to have those responsible prosecuted and tried, and that the proceedings were unduly delayed. The Committee notes that in the present case, the authorities initiated an investigation on 17 October 1994, i.e., immediately following the explosion; this investigation led to the arrest, prosecution and subsequent trial of six suspects. In response to the appeal in May 2003, following the initial acquittal of the six individuals in a trial held between November 2000 and June 2002, the Supreme Court referred the case back to the same court for further investigation and trial. In June 2004, following the second acquittal of the accused, the Supreme Court again examined the case, and in March 2005, ultimately confirmed the acquittal. In the circumstances, and in the light of the material on file, the Committee considers that the delay of the above-mentioned proceedings cannot be considered unreasonable nor the result of unjustified prolongation of the proceedings by the authorities, even if a new investigation was subsequently opened by the General Prosecutor's Office.

10.3 The Committee has taken note of the author's claims that the court trials in this case were unlawful; that the courts were biased because the judges were military officers and five of the six accused were active military officers and that there was a relationship of hierarchical subordination between the two judges presiding over the two first-instance trials. The Committee notes that the State party has not refuted these allegations specifically, but only stated that the trial was held in strict compliance with the provisions of the criminal procedure law. The Committee further notes the author's claim that the military officers accused of the explosion and the death of her son were acting outside the framework of their official duties as members of the armed forces and that the accusation maintained that they had acted under the informal orders of the Minister of Defense and not in their official capacity.

10.4 The Committee recalls its general comment No. 34,¹¹ which states that attacks on journalists, among others, should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, should receive an appropriate form of redress (para. 23). It further recalls that its general comment No. 31¹² stresses that failure by a State party to bring to justice perpetrators of

¹¹ See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V; also para. 12 of the basic Principles and guidelines on the rights to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (General Assembly resolution 60/147, annex) states that "a victim of a gross violation of international human rights law ... shall have equal access to an effective judicial remedy as provided for under international law."

¹² See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

such violations could in and of itself give rise to a separate breach of the Covenant (para. 18). General comment No. 31 further states that these obligations arise notably in respect of violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). The Committee remains concerned that the problem of impunity for these violations may well be an important contributing element in their recurrence.

10.5 In this context, the Committee considers that in a democratic State where the rule of law must prevail, military criminal jurisdictions should have a restrictive and exceptional scope. In this connection, the Committee refers to principle 9 of the draft Principles governing the administration of justice through military tribunals, which states: “in all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”¹³ In the present case, while five of the six accused tried by the Moscow Regional Military Court were indeed military personnel, they were manifestly and uncontestedly not engaged in official duties. The State party has not attempted to give an explanation, beyond citation of its own law, as to why military justice was the appropriate jurisdiction to try military personnel accused of this grave crime. Consequently, the author’s right to reparation for herself as well as in the name of her son, was seriously compromised. Accordingly, the Committee concludes that the author’s rights under article 2, paragraph 3 (a), in conjunction with article 6, paragraph 1, of the International Covenant on Civil and Political Rights have been violated. In the light of this conclusion, the Committee decides not to examine separately the claims made by the author under article 14, paragraph 1, of the Covenant.

10.6 As to the author’s remaining claims, the Committee considers that the material before it does not enable it to conclude in a definitive manner that the explosion on the newspaper’s premises and the resulting death of the author’s son can be imputed to the State party’s authorities seeking to prevent him from performing his duties as a journalist. Consequently, the Committee cannot conclude that the State party has violated Mr. Kholodov’s rights under article 2, paragraph 3; article 6, paragraph 1, and article 19 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author’s rights under article 2, paragraph 3 (a), in conjunction with article 6, paragraph 1, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, and take all possible measures to ensure the those responsible for the death of her son are brought to justice. Furthermore, the State party is under an obligation to avoid similar violations in the future.

13. Bearing in mind that by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State

¹³ See E/CN.4/2006/58; also principle 29 of the updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) states: “the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”

party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**D. Communication No. 1558/2007, *Katsaris v. Greece*
(Views adopted on 19 July 2012, 105th session)***

<i>Submitted by:</i>	Nikolaos Katsaris (represented by World Organisation Against Torture and Greek Helsinki Monitor)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Greece
<i>Date of communication:</i>	6 October 2006 (initial submission)
<i>Subject matter:</i>	Failure to thoroughly investigate police violence and ill-treatment against ethnic Romani
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a remedy; right not to be subjected to torture; right to equality before the law
<i>Articles of the Covenant:</i>	2, para. 3, alone and read in conjunction with 7; 2, para. 1, and 26
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 2012,

Having concluded its consideration of communication No. 1558/2007, submitted to the Human Rights Committee by Mr. Nikolaos Katsaris under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 6 October 2006, is Nikolaos Katsaris, a Greek national of Romani ethnic origin, born on 20 November 1975. At the time of the initial submission, he resided at the Romani settlement of Halandri. He claims to be a victim of violations by Greece¹ of article 2, paragraph 3, alone and read in conjunction with

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

In accordance with rule 91, of the Committee's rules of procedure, Mr. Michael O'Flaherty did not participate in the examination of the present communication.

¹ The Covenant and the Optional Protocol entered into force for Greece on 5 May 1997.

article 7; and articles 2, paragraph 1, and 26 of the Covenant. The author is represented by counsel, World Organization against Torture and Greek Helsinki Monitor.

1.2 On 9 March 2011, the Committee decided that the communication was admissible insofar as it raised issues with respect to article 2, paragraph 3, alone and read in conjunction with article 7; and articles 2, paragraph 1 and 26 of the Covenant.

The facts as presented by the author

2.1 On 12 September 1999, the author, his father, Yannis Katsaris, his brother, Loukas Katsaris and his cousin, Panayiotis Mitrou drove from Athens to Nafplio (Peleponese) to search for a cheap professional car at the open-air car markets there. When leaving the third car market, the author's car was stopped by three police officers in uniform. They pointed their firearms at the author and his family members and ordered them to get out of the car and hold their hands up. The police proceeded to search them and their car. When the author tried to explain the aim of their visit, one of the police officers shouted an insult at him. After some time, the author was asked to explain the reasons for their visit to the car markets. He offered to show the police officer the notes he had taken on the models and prices of cars he was interested in, but the police officer ignored the notes.

2.2 When the author's cousin asked if he could lower his hands, the author was violently kicked by police officer D., presumably because the officers thought that it was the author who had spoken without prior authorization. When the author's cousin confessed that he was the one who had spoken, he was led away from the car, kicked, punched and verbally abused. The author witnessed the abuse. The author noticed that the cadet, who was pointing his gun at him, was shaking and he feared the gun might go off accidentally. When the author's father tried to inquire what the police officers wanted, he was pulled by the hair and punched repeatedly in the side.

2.3 The police officers accused the author and his family of being at the car markets to steal a car and accused them of having jumped over a fence at one of the car markets. The author and his family members were handcuffed, except the author's father who was ordered to follow the police car driving the author's vehicle.

2.4 Upon arrival at the police station, the police noted that police warrants had been issued against all concerned except the author's brother. The author and his family were placed in holding cells, which were already overcrowded. After about an hour, the author heard someone yelling "Bring up the 'Gyftoi'!", a racially motivated insult against persons of Romani origin. The author's cousin and brother were released when it was ascertained that they did not have any outstanding warrants against them.

2.5 The author and his father, however, were returned to separate holding cells because of the outstanding police warrants against them. The author managed to use the telephone in the corridor of the holding pen and called counsel. When counsel called the police station to complain against the ill-treatment of and the racism against the author and his father, the police officer replied that "these things happen sometimes". On 13 September 1999, the author was released and subsequently contacted a lawyer who managed to have the author's father released on the same day. At no point during their time in police custody, the author and his family were notified of their rights to have access to a lawyer, notify their family of their detention or to be examined by a doctor.

2.6 On 27 October 1999, the author filed a criminal complaint with the Misdemeanour Prosecutor of Nafplio against the police officers of Nafplio Police Department who were involved in his ill-treatment, including police officer D., whom he could identify by his first name. He accused the police officers of subjecting him to racially motivated humiliation and physical and psychological ill-treatment. He further submitted that the arrest and ill-treatment he had suffered were based on his Romani ethnic origin. Despite his allegations

of physical ill-treatment, no forensic medical examination was ordered. In November and December 2000, three police officers, G.K., G.P., D.T. were questioned before the Magistrate of Nafplio. The head of the police department G.K. confirmed that on 12 September 1999, three officers G.P., D.T. and N.L. (N.L. was never questioned) were involved in an incident with Roma individuals at an open-air car market. Nevertheless, D.T., in his separate testimony, denied any contact with the author and his family. On 14 January 2002, a police officer, A.D., on duty at the security police department testified before the Magistrate that he had verified the identity of the author and his family, while the police officer, C.K., in charge of detainees stated that he did not know the author, as he had not been in charge of arrestees.

2.7 After the statements of the police officers, the prosecution, in breach of the normal procedure, which should first seek the applicant and his witnesses' statements, summoned the author (the applicant) and his witnesses to testify before an Athens magistrate. In March 2002, the author's cousin and brother were summoned to testify. However, the summonses were not delivered to the witnesses' places of residence nor did they contain a signature that they had been served. On 20 March 2002, the two witnesses were subpoenaed; however the police noted that they could not find them as "they were wandering around the country". On 12 September 2002, the Magistrate summoned the author and the police stated that the summons had been delivered to the author's mother, wrongly identified as his co-tenant; however no signature of her receipt is shown on the summons. The author had never received the summons and therefore did not attend the procedure.² On 23 January 2003, the Misdemeanour Prosecutor of First Instance found that the author's complaint was unfounded and noted that the author and his witnesses did not appear to testify because "they were wandering around the country". On 19 February 2003, the Prosecutor's ruling was served to the author's wife.

2.8 On 2 June 2000, an ex officio second investigation, prompted by a letter of complaint about the author's ill-treatment to the Minister of Justice by a member of the non-governmental organization (NGO) Amnesty International, was opened. The second investigation commenced by taking depositions from the author and his witnesses on 3 November 2000 and 10 and 12 April 2001. The author and his witnesses were unaware and not informed that they had testified in different proceedings than the ones initiated by the author on 27 October 1999. Unlike in the first proceedings, depositions from the author and his witnesses and the police officers were not taken by Magistrates at the Nafplio court but by fellow police officers stationed at the same police station.

2.9 On 25 May 2001, A.D, K.K. and P.P. testified that they had been the arresting officers in plain clothes, that no resistance had been offered by the author or his family members and that there had been no abuse inflicted on them. P.P. qualified the author's allegations as lies. None of the three officers, G.P., D.T. and N.L., who in their depositions collected in the course of the first investigation, claimed that they were the arresting officers, testified or were mentioned in the second investigation. Furthermore, the author underlines that, on 25 May 2001, in the second investigation, police officer A.D. testified that he was one of the arresting officers, while in the first investigation, he testified on 14 January 2002, that he only verified the author's and his family's identity.

2.10 On 10 October 2001, the Nafplio Prosecutor of First Instance emitted three rulings dismissing the complaints submitted by the author, his father and his cousin. In the rulings,

² The author claims that in violation of articles 155 and 156 of the Code of Criminal Procedure, the summonses in the author's and his family's absence were not posted on their doors or in a prominent public place if the address was unknown. He further notes that contrary to article 161 of the Code of Criminal Procedure, the report on the serving of summons does not contain any signature.

the Prosecutor stated that all three police officers had testified that the author and his family did not raise any complaints upon departure from the police station and that the author had offered no explanation why he failed to report the incident. The Prosecutor ignored the author's complaint of 27 October 1999. It further refutes any acts of ill-treatment and adds that, even assuming that the allegations of the author were true, the punishable acts would have been those of causing bodily harm, which can only be prosecuted following a complaint within three months.³ In a letter dated 15 October 2001, the First Instance Prosecutor submitted the rulings with the case file to the Appeal Prosecutor's Office for his approval.

2.11 On 16 December 1999, after receipt of the author's complaint of 3 December 1999, the Greek Ombudsman sent a letter to the police directorate asking them to undertake an immediate and thorough investigation into the allegations. On 2 June 2000, the police communicated to a member of Amnesty International the results of the "thorough administrative inquiry" conducted into the allegations by the author. Contrary to the ruling of the Nafplio Prosecutor of First Instance of 10 October 2001 (the second investigation), but in line with the ruling of the Nafplio Prosecutor of First Instance of 23 January 2003, the administrative inquiry found that D.T., G.P. and N.L. were the arresting officers. Additionally, the findings include claims that were not made by any of the police officers in their depositions during the two investigations, for example that two Roma tried to escape and were caught by the officers who drew their weapons, that this was then followed by "mass reaction and protests by the author and his family", and that the arrest was only possible by a second police patrol car. The findings further point out that the officer whom the author could identify by first name is D.T., however claims of any misbehaviour were dismissed. The original report, identical to the one sent to Amnesty International, was dated 24 January 2000 and sent to the Ombudsman on 21 April 2000; however the Ombudsman never informed the author about this report.

2.12 With regard to the exhaustion of domestic remedies, the author submits that he exhausted all available remedies by filing a complaint to the Prosecutor of First Instance, on 27 October 1999, which was dismissed by the Prosecutor of First Instance after three and a half years of preliminary investigation. The second ex officio preliminary investigation was dismissed on 10 October 2001. On 3 December 1999, the author filed a complaint to the Ombudsman requesting a sworn administrative investigation against the accused police officers. On 16 December 1999, the Ombudsman sent a letter to the Hellenic Police urging an immediate and thorough investigation. The administrative inquiry concluded that the police's actions had been lawful. The Ombudsman decided not to request a sworn administrative investigation⁴ in view of the alleged need to use the Nafplio police station to quell anti-Roma unrest in the area in May 2000.

2.13 The author submits that the complaints he filed did not offer him an effective remedy. The Prosecutor of First Instance failed in his/her duty to order an immediate forensic examination, the two preliminary criminal investigations were not connected to each other and no effort was made to explain the mutually exclusive facts and inconsistencies. The ruling of the Nafplio Prosecutor of First Instance does not constitute a judicial decision and there are considerable doubts as to the independence and impartiality of the investigations and the ruling. Additionally, the author submits that the disciplinary proceedings do not offer guarantees of impartiality, as the oral administrative inquiry is an internal investigation conducted by fellow police officers and evidence and testimonies

³ The author had complained after one and a half months.

⁴ Sworn administrative investigations are generally carried out by special units (administrative investigation sub-directorates) which are administratively independent from the departments to which the police officers in question belong.

remain inaccessible for the complainant. Furthermore, the administrative inquiry lacked thoroughness, as the date on which the author filed his complaint was mistaken and it did not attempt to explain or reconcile the conflicting information collected from the police officers in the two preliminary investigations. It further inserted new facts, such as the author and his family offering resistance serious enough for the police to draw their weapons, while no deposition by any police officer corroborated this. According to the author, there are no available remedies for Romani victims of police violence, due to patterns of anti-Romani sentiment among police officers and public authorities and the failure by authorities to ensure impartiality and transparency of investigations, safeguard detainee's rights during police custody and ensure prompt access to forensic medical examination.⁵

2.14 The author recalls the Committee's jurisprudence, according to which the obligation to provide effective remedies entails: (a) investigating the acts constituting a violation, (b) bringing to justice any person found to be responsible for the ill-treatment, (c) granting compensation for any injury and/or damages suffered, and (d) ensuring that similar violations do not occur in the future. According to the Committee's general comment No. 20, the first element of the remedy in particular in regard to cases of torture and ill-treatment is a prompt and impartial investigation by competent authorities.⁶ Upon arrest and police custody, the author was denied his rights as a detainee to notify his family, have access to a lawyer, request a medical examination and be informed of his rights. While acknowledging the Prosecutor's freedom to institute criminal proceedings or not, the author submits that there was valid and sufficient cause to open criminal proceedings, as the prosecutors were confronted with allegations by Roma individuals of police brutality. The author further submits that in his case only two preliminary investigations were carried out and they did not lead to a review by the judicial council and to being heard before a court. The case has therefore not been adjudicated by an independent judicial authority, violating the author's right to a legal remedy.

The complaint

3.1 The author claims that, besides the incoherencies and deficiencies of the preliminary investigations, those investigations were unreasonably prolonged. The author filed his complaint on 27 October 1999 and a ruling by the Prosecutor of First Instance was only issued on 11 February 2003. The author recalls the Committee's jurisprudence, according to which a delay of over three years for the adjudication of a case at first instance is unreasonably prolonged.⁷ He further explains that according to article 31 of the Code of Criminal procedure, a preliminary inquiry cannot last for more than four months. He therefore submits that he is a victim of a violation by the State party of article 2, paragraph 3, alone and read in conjunction with article 7.

3.2 The author submits that the physical acts of violence against him were disproportionate to the particular situation. He did not pose any danger or offer any resistance, as confirmed by the depositions of the police officers in both preliminary

⁵ The author quotes in this respect, inter alia, the Committee's concluding observations on Greece, the concluding observations of the Committee against Torture, the report of the European Committee on the Prevention of Torture on its visit to Greece, CPT/Inf (2002) 31, paras. 41–45, and the European Court of Human Rights case *Bekos and Koutropoulos v. Greece*, No. 15250/02, para. 16.

⁶ See general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

⁷ See communication No. 336/1988, *Fillastre and Bizouarn v. Bolivia*, Views adopted on 6 November 1990, para. 5.3.

investigations. The author submits that he suffered physical pain when he was kicked without reason by a police officer, he also suffered great psychological distress when he unexpectedly had a gun pointed at him, in particular by an inexperienced and nervous cadet. He had to witness his relatives being beaten and having guns pointed at them. The author was further subjected to degrading treatment with the object to debase and humiliate him when he was insulted. The nature of these acts is further aggravated by the fact that they were racially motivated. The use of “Athinganoi” (derogatory term used in the past by police to refer to Roma in Greece) in the deposition of G.K., “Gyftoi” (see para. 2.4), and “wandering around the country” in the ruling of the Prosecutor make apparent the discriminatory intent and racial hostility aimed at humiliating Roma individuals. The facts therefore constitute a breach of article 7.

3.3 The author further submits that he is a victim of a violation of articles 2, paragraph 1, and 26, as he was subject to discrimination on the basis of his ethnic Roma origins, which manifested itself by the ill-treatment inflicted on him by the police. The lack of an effective investigation into the incident reveals discrimination before the law. The police officers acted against the author in a degrading manner using racist language and referring to his ethnic origin in a pejorative fashion. This attitude needs to be situated in a broader context of systematic racism and hostility by the State party’s law enforcement bodies against Roma.⁸ Despite wide dissemination of the author’s case by NGOs and the plausible information available on file, neither the investigations, nor the administrative inquiry verified whether the police officers had inflicted racial verbal abuse on the author or whether the accused police officers had previously been involved in similar incidents demonstrating anti-Romani sentiment. The State party therefore failed to take steps to investigate whether or not discrimination may have played a role in the events.

State party’s observations on admissibility

4.1 On 3 July 2007, the State party submits its observations on admissibility. With regard to the facts, the State party submits that on 12 September 1999, the Police Directorate of Argolida was informed that certain individuals riding a car jumped over a fence and trespassed on the site of two open-air car exhibitions. The car was then spotted by a Nafplion police station patrol car carrying sergeants D.T., G.P. and trainee sergeant N.L. When the police officers asked the author and his family to stop the car, three of the four passengers tried to escape. As it was late at night, the police officers had to perform control procedures with their weapons at hand. However, as the suspects failed to obey, a second patrol car arrived to help with the arrest. At the Security Department of Nafplion an official identity check showed that the author and his father had already been convicted of other criminal offences without having served their sentences; therefore they were detained to serve their sentences. The other two were released after identification. On 13 September 1999, the author and his father were also released. On 27 October 1999, 1 month and 15 days after the incident, the author filed a complaint before the Public Prosecutor of the Misdemeanors’ Court of Nafplion. A preliminary investigation was ordered and D.T. testified that he had not had contact with the arrested individuals. A.D. and G.P. testified that they had not noticed any injury or insult. The author as plaintiff and his father, brother

⁸ The author refers to the European Commission against Racism and Intolerance, third report on Greece, CRI (2004) 24, 5 December 2003; Amnesty International, “Out of the Spotlight: The rights of foreigners and minorities are still a grey area”, EUR 25/016/2005; European Roma Rights Centre and Greek Helsinki Monitor, “Cleaning Operations: Excluding Roma in Greece”, Country Report Series, No. 12 (2003); International Helsinki Federation for Human Rights, *International Helsinki Federation Annual Report on Human Rights Violations (2005): Greece (2005)*; and World Organisation against Torture and other NGOs submission to the Committee against Torture, 2004.

and cousin as witnesses did not appear to testify despite being subpoenaed at their residence addresses given to the Prosecutor. On 19 February 2003, the complaint was dismissed as ill-founded.

4.2 On 30 January 2000, a representative of Amnesty International filed a report with the Minister of Justice about the incident of 12 September 1999 and requested the conduct of an independent and objective investigation. At the same time, the author, his father and his cousin submitted their complaints on 3 November 2000 and 10 and 12 April 2001. These complaints were submitted in the context of the preliminary investigation following the transmission of the letter by a representative of Amnesty International. On 10 October 2001, the Public Prosecutor of the Nafplion Court of First Instance issued a decree stating that the testimonies of the author's family did not clarify whether the author had suffered any injury or harm and that no medical certificate had been produced. It further noted inaccuracies between the author and his family's statements with regard to insults to his father and cousin. On 3 November 2001, the decree of 10 October 2001 was served to the author's mother. In addition to that, an administrative inquiry was conducted, in which passers-by confirmed that the author and his family had refused to be submitted to an identity check. Furthermore, the alleged ill-treatment at the police station was not proven as no evidence was produced and the complaints were not submitted promptly, therefore no forensic examination was carried out.

4.3 Referring to article 48 of the Code of Criminal Procedure (CPC),⁹ the State party submits that the author could have made use of an effective special remedy in form of an appeal within 15 days of service to the Public Prosecutor of the Court of Appeal. According to the CPC, the Public Prosecutor of the Court of Appeal has the right to carry out a preliminary investigation, if he considers that the one conducted by the Public Prosecutor of the Misdemeanors' Court was inadequate. He also has the right to order the continuation of the preliminary examination or compulsory criminal investigation. The prosecutorial order of 21 January 2003, which was served to the author's wife and co-tenant, could have been appealed, within 15 days, before the Prosecutor of the Court of Appeal. If successful, the appeal would have resulted in the initiation of criminal proceedings and further preliminary investigation. The State party also submits that the author failed to appeal the prosecutorial decree of 10 October 2001. This decree was served to his mother who did not live with him. Even if it is accepted that this service was null and void, the author could have relied on the nullity of service and lodged an appeal, even if the deadline had lapsed. The author has therefore failed to exhaust domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments

5.1 On 29 January 2008, the author submits his comments and underlines that the State party's account of the facts is not only contrary to the account by the author but also contradicted by its annexes.

5.2 The author challenges the State party's claim that the police had been informed that the author and his family members "jumped over a fence and trespassed on the site of two open-air car exhibitions". He argues that if that were to be true, they should have been charged with an offence and taken to court, instead of being released the following day.

⁹ Article 48 of the code of Criminal Procedure: "The complainant may, within 15 days from service of the public prosecutor's decree referred to in paras. 1 and 2 of the preceding article, appeal to the competent public prosecutor of the court of appeal against the decree of the public prosecutor of the misdemeanours' court ... If the public prosecutor of the court of appeal grants the appeal, he shall order the public prosecutor of the misdemeanours' court to institute criminal proceedings."

While the author acknowledges that such a statement had been made by two police officers in the framework of the first investigation, he notes that none of the police officers in the second investigation maintained this statement. The author maintains that they remained outside of the fence taking notes of car licence plates.

5.3 The author underlines the contradiction in the State party's statement, according to which "the police officers in the patrol car were sergeants D.T., G.P. and trainee sergeant N.L.". Indeed, during the first investigation, these were the names reported by the police, however, in the second investigation the names of the police officers were A.D., K.K. and P.P. The author and his family were never asked to identify any police officers; therefore, they cannot know which three out of the six police officers were the arresting officers.

5.4 With regard to the State party's assertion that "when the police officers asked them to stop for an identity check, three of the four passengers of the vehicle opened the doors and started to run in order to escape. However, they were quickly intercepted by the police officers, who prevented their escape", the author argues that none of the five questioned police officers reportedly to have been in the patrol car (the sixth never testified) testified of any attempted escape and if it were true, the author and his family should have been charged with this offence.

5.5 The author further challenges the State party's claim that the police control took place "late at night". He cites the police chief commander who testified that he dispatched the patrol car in the afternoon hours and the three officers' testimony in the second investigation, which states that the check was done at 6 p.m. The author argues that with this false claim the State party tries to explain why the police officers performed the check "with weapons at hand" and submits that this confirms the author's claim of abusive behaviour.

5.6 With regard to the State party's claim that "the suspects would not obey the police officers' orders, so a second patrol car arrived to help arrest and lead the suspects to the police station of Nafplio for identification", the author underlines that he considers this to be the most serious false claim, as none of the police officers made such a statement, on the contrary, they all reported that the author and his family were taken to the police station in one patrol car and their own car. He also submits that this claim is defamatory and in violation of the presumption of innocence. If it were true, they should have been charged with an offence.

5.7 Moreover, the author notes that the State party has not explained the contradiction of naming D.T. among the patrolling officers and citing his own statement, which holds that he denies all charges and testifies that he had no contact with the author and his family.

5.8 The author further challenges the State party's statement that the witnesses proposed by the author were subpoenaed "in a timely manner", without, however, mentioning any dates. The author notes that the State party does not offer any arguments to counter his documented claim that neither he nor his witnesses were ever summoned at the dates claimed.

5.9 With regard to the State party's statement that the police carried out a thorough administrative investigation, the author maintains that it was an informal investigation, as neither he nor his family was ever asked to testify. The report does not mention on whose testimonies it relies.

5.10 The author notes that the State party fails to describe what happened at the police station, where most of the abuse against the author and his family had occurred.

5.11 The author reiterates that, even if the “appeal” as defined in article 48 of the CPC was actually possible, it would not have been effective, as it would have been unreasonably prolonged.¹⁰ The preliminary investigation had lasted for about three and a half years, in contravention with article 31 of the CPC, which holds that a preliminary investigation cannot last for more than four months. Furthermore, the author underlines the importance of a prompt investigation into allegations of ill-treatment due to human memory being frail and suspicion of police collusion.

5.12 Recalling the Committee’s jurisprudence, the author submits that the alleged remedy would have been futile, due to the absence of procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal. The author underlines that in 2003, three and a half years after the incident, he was served the prosecutor’s decree which mentions that he or his witnesses never testified as “they were wandering around the country”, yet the author has a fixed address, and he and his witnesses testified in November 2000 and April 2001. In July 2006, counsel sought access to the case file and it was only at that moment that it became apparent that two sets of proceedings had been instituted.

5.13 The author further submits that the alleged appeal is not an effective remedy but an extraordinary one that need not be exhausted. The author argues that the procedure defined in article 48 of the CPC is inaccurately translated into English and is not an appeal (“efessi”) but an application for review (“prosfygi”). The review procedure leads to a review of the decree issued by the Prosecutor of First Instance by the Appeals Court Prosecutor, without it being a public hearing by a tribunal. The result of such an application, reviewed without party testimonies, is that the Appeals Prosecutor may return the case file to the Prosecutor of First Instance with a request for additional preliminary inquiry. Moreover, according to domestic law, preliminary investigations are secret and the author could not have accessed the case file to prepare his application under article 48 of the CPC.

5.14 Finally, on 15 October 2001, the Prosecutor of First Instance submitted the file of the second ex officio investigation to the Appeals Prosecutor for review and approval of her dismissal. The Appeals Prosecutor endorsed the dismissal, therefore, in view of this decision by the Appeals Prosecutor, an application for review filed two years later on the same case would have been futile.

Decision of the Committee on admissibility

6.1 The Committee examined the admissibility at its 101st session on 9 March 2011.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 Regarding the State party’s contention under article 5, paragraph 2 (b), of the Optional Protocol, according to which the author has failed to exhaust domestic remedies, the Committee noted the State party’s argument that the author could have filed a special remedy in the form of an appeal to the Prosecutor of the Court of Appeal under article 48, of the Criminal Procedure Code (CPC).

6.4 The Committee also noted the author’s argument that the remedy as defined in article 48 of the CPC, was not an effective remedy, as it is extraordinary and as the review is carried out by the Prosecutor of the Court of Appeal without party testimonies.

¹⁰ The author cites in this respect communication No. 336/1988, *Fillastre and Bizouarn v. Bolivia*, see note 10.

Furthermore, the Committee noted the author's claim that the remedy would have been unreasonably prolonged as the preliminary investigation already lasted for about three and a half years.

6.5 The Committee recalled that article 5, paragraph 2 (b), of the Optional Protocol, by referring to "all available domestic remedies", refers in the first place to judicial remedies.¹¹ It also recalled that under article 5, paragraph 2 (b), of the Optional Protocol, the author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress.¹² The Committee noted that two separate preliminary investigations were carried out into the author's allegations of ill-treatment, the first one was triggered by the author's complaint of 27 October 1999 and was dismissed by the Prosecutor of First Instance on 23 January 2003, three years and three months later, and the second one was initiated ex officio on 2 June 2000 and was dismissed on 10 October 2001, one year and four months later. The Committee observed that the remedy based on article 48 of the CPC could lead to preliminary investigations by the Appeals Prosecutor or to further preliminary investigations or criminal investigations by the Prosecutor of First Instance. The Committee considered that in the light of the length of both preliminary proceedings of three years and three months and one year and four months respectively and the possible outcome of such an appeal leading to further preliminary or criminal investigations, the remedy under article 48 of the CPC did not offer the author a reasonable prospect for redress. The Committee recalled that the effectiveness of a remedy also depends on the nature of the alleged violation.¹³ In the case before it, the author alleges ill-treatment by the police together with discrimination on the basis of his ethnic Romani origin, which, according to the Committee, would have warranted a thorough investigation with the possibility to bring to the case before a competent, independent and impartial tribunal. Furthermore, the Committee considered that a delay of three years and three months and one year and four months respectively for preliminary investigations justified the conclusion that the pursuit of domestic remedies was unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the light of the absence of effectiveness and the prolonged delay, the Committee considered that, for purposes of admissibility, the author was not required to avail himself of the alternative to appeal to the Prosecutor, under article 48 of the CPC and, therefore, declared the communication admissible.

6.6 The Committee therefore decided that the communication was admissible insofar as it raised issues with respect to article 2, paragraph 3, alone and read in conjunction with article 7; and articles 2, paragraph 1 and 26, of the Covenant.

State party's observations on the admissibility and merits

7.1 On 6 October 2011, the State party submits its observations on the merits and provides further observations on admissibility. The State party recalls that article 5, paragraph 2 (b), of the Optional Protocol relates to the time required for the conclusion of the procedure concerning the remedy and the availability of that remedy cannot be undermined by considerations of the time required for previous proceedings, such as

¹¹ See communication No. 262/1987, *R.T. v. France*, decision of inadmissibility of 30 March 1989; and communication No. 1515/2006, *Schmidl v. Czech Republic*, decision of inadmissibility of 1 April 2008.

¹² See communication No. 437/1990, *Pereira v. Panama*, Inadmissibility decision adopted on 21 October 1994, para. 5.2.

¹³ See communication No. 612/1995, *Chaparro et al. v. Colombia*, Views adopted on 14 March 1996, para. 5.2; communication No. 322/1988, *Rodríguez v. Uruguay*, Views adopted on 19 July 1994, para. 6.2; communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.2.

preliminary criminal investigations. It submits that the effectiveness of the appeal to the Appeals Prosecutor under article 48 of the Criminal Procedure Code (CPC) should not depend on the conduct of preliminary investigations. It notes that a speedy conclusion of the appeal under article 48 of the CPC cannot be excluded. It also notes that if the Appeals Prosecutor declares the appeal under article 48 of the CPC admissible, he can ask for the commencement of proceedings in order to press charges and have the criminal case heard before the competent tribunal.

7.2 The State party submits that if the Committee insists on the ineffectiveness of the domestic remedy under article 48 of the CPC, the amendment of 2010 concerning the expedition of penal procedures to eliminate an unreasonably prolonged time for the conclusion of the preliminary investigation should be noted. Thus, the preliminary proceedings cannot exceed the period of three months and the Prosecutor needs to submit his proposal within two months. The State party reiterates that the remedy under article 48 of the CPC is considered effective by the vast majority of the domestic tribunals and prosecution authorities¹⁴ and it is established that the remedy consists of second instance judicial competence of the Appeals Prosecutor. It also notes that an order of the Appeals Prosecutor rejecting an appeal is not considered *res judicata* and therefore re-examination is permissible if new evidence or information is adduced. It submits that the problem of delays in proceedings of preliminary investigations in penal cases cannot render the remedy under article 48 of the CPC ineffective.

7.3 On the merits, the State party recalls the Committee's jurisprudence, according to which a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent to the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations.¹⁵ It also recalls that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.¹⁶ It further notes that it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. It notes that the Committee has concluded that, where the State party does not deny the use of force and the investigations have failed to identify those responsible while the victim of force has not been afforded an effective remedy in the form of proper investigations into his ill-treatment, this amounts to a violation of article 7 read together with article 2.¹⁷

7.4 The State party notes that the author's claims of ill-treatment before and during police detention have not been verified. It notes that, according to the affidavit of 10 April 2001 by the author's brother, the police did not hit the brother. The same inquiry also noted that unexecuted criminal judgments were pending against the author and his father. The

¹⁴ The State party cites orders Nos. 24/2009 and 19/2009 of the District Attorney of Corfu court of Appeal, orders Nos. 97/2007 and 79/2007 of the District Attorney of Larissa Court of Appeal, judgment No. 38/2010 of the Supreme Court (in Board), and orders Nos. 61/2008 and 1177/2007 of the District Attorney of the Athens and Lamia Court of First Instance.

¹⁵ See communication No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2.

¹⁶ See communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3; communication No. 84/1981, *Barbato and Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

¹⁷ See communication No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2.

State party maintains that it was for this reason that the author's car had been stopped. The author and his family wanted to avoid the police check and two out of four passengers tried to escape. The State party notes that the informal administrative inquiry confirmed this incident and noted that it was seen by passers-by who assisted the police in holding the author and his family. The inquiry did not establish any acts of force and the State party notes that the incident occurred on a public road and in daylight and passers-by offered assistance to the police, which make the use of force improbable. The State party notes that, apart from affidavits of 2001, in which the author and his cousin mentioned that they were each kicked once, the author or his family members never reported any injury to the prosecutor or the police and they did not ask to be examined by a doctor when they left the police station. The State party submits that the author and his family members did not make any complaint to the competent authorities on 12 September 2001¹⁸ or shortly thereafter.

7.5 The State party further submits that no act of force took place while the author and his family members were detained at the police station. The State party refers to the statements of 3 November 2000, 10 April 2001 and 12 April 2001 by the author and his family, which do not mention that they have been subjected to any form of police force during their detention. It concludes that since the author and his family were not injured upon arrest or detention, the State party should be relieved of the burden to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations.

7.6 With regard to the author's allegations of verbal abuse by racist comments, the State party notes that neither he nor his relatives made any complaints; it also notes that the author did not inform the Greek Helsinki Monitor or his lawyer of his allegations of racial discrimination while he was being detained.

7.7 In accordance with the ruling of the Nafplio Prosecutor of First Instance of 10 October 2001, the author's affidavit of 3 November 2000 does not clarify whether he suffered any bodily harm or damage to his health and no relevant medical certificate was produced. It is also noted that the author did not explain why he did not report the alleged ill-treatment until 3 November 2000, the date of the affidavit, which he rendered in the context of an ex officio investigation triggered by a complaint by a member of Amnesty International.

7.8 Nonetheless, the State party submits that all the author's complaints were investigated in good faith and that, on 10 October 2001, the Nafplio Prosecutor of First Instance issued a ruling dismissing his complaints. Subsequently, the Nafplio Prosecutor of First Instance issued a ruling of 23 January 2003 dismissing the complaints, as the author and his family members, despite having been lawfully summoned, did not testify before the Prosecutor. Additional statements were taken on 10 September 2007 in the framework of the administrative inquiry and police officers A.G and G.P. noted that the author and his family members had not requested any medical examination during their detention. The administrative inquiry came to similar conclusions as the criminal investigation, revealing no inappropriate behaviour by the police during the car check and the police detention. The State party therefore submits that the communication should be declared inadmissible and, in any event, unfounded on the merits.

The author's comments on admissibility and the merits

8.1 On 12 December 2011, the author submits his comments and notes that the Committee's decision on admissibility should be considered final, as the State party has not

¹⁸ The State party refers to the 12 September 2001 as the day of the incident.

offered any new information that would merit reconsideration. The author submits that, in particular, he does not see, how amendments to the CPC introduced in 2010 relate to his case. In any event, according to the amendments, the preliminary investigation cannot exceed three months, instead of four months. He recalls that the two investigations in his case lasted for one year and four months and three years and three months. He also stresses that the legal provisions introducing a time limit do not provide for nullity and that there are no consequences for investigations that exceed the time limit.

8.2 On the merits, the author notes his brother's statement of 10 April 2001, relied on by the State party to refute his claims and argues that the whole statement should be considered. He recalls that his brother noted that his father stopped the car immediately when he heard a police siren, that the police officers were pointing guns at them while they were searching their car. He stated that the author was kicked and his cousin and father were punched by a police officer. He further explained that, with the exception of his father, who was asked to follow the police car to the station, they were handcuffed and at the station locked in a cell. Three hours later, he and his cousin were freed. He noted that he was not hurt by any police officer.

8.3 The author further submits that the alleged attempt to avoid police check is refuted in the sworn statements by police officers G.P., A.D., K.K. and P.P. of 7 December 2000 and 25 May 2001, respectively. All the police officers note that the author and his family, some police officers refer to them as "athiganoi",¹⁹ were investigated in the vicinity of an open-air car market and were thereafter led to the police department because they could not produce their identity cards. The author further notes the conclusions by the Prosecutor of First Instance dated 10 October 2001, who observed that the police requested the author and his family to identify themselves and as they did not carry their documents with them, they were hand-searched by police officer A.D. and then requested to come to the police station to confirm their identity data and to check if there were any outstanding convictions against them. The author further observes that neither the cited police statements nor the ruling by the Prosecutor of First Instance mentions that the incident was seen by passers-by who assisted the police officers to hold the author and his family. Moreover, the author argues that, had they offered any resistance to the police, they would not have been asked to follow to the police station driving their own car.

8.4 With regard to the ill-treatment upon arrest, the author refutes the State party's observations and observes that the statement by his brother cited by the State party and thus considered credible, notes that the author and Panagiotis Mitrou were kicked once, his father was punched and guns were pointed at them. The author reiterates that he described in detail the ill-treatment in his complaint of 27 October 1999.

8.5 With regard to the State party's statement that the author or his family did not report any injuries to the prosecutor or police and did not ask to be examined by a doctor, the author recalls his initial submission, in which he had noted that counsel had spoken to the police while he was still in detention raising the issue of ill-treatment and racism, that, on 27 October 1999, the author filed a complaint and, on 1 December 1999, Amnesty International published a press release on the basis of the information provided by him. Finally, on 3 December 1999, he filed a complaint to the Ombudsman.

8.6 The author confirms that he did not claim any acts of force in the police station; however, he reiterates his claim that there was verbally racially abusive behaviour and threats of use of force.

¹⁹ According to the author, this is a way of calling a person of Roma origin has racial connotations.

8.7 The author notes that the State party's observations contain arguments that are refuted by its own agents or by documents on file. He considers the State party's argument of the alleged resistance by the author and his father defamatory.

8.8 With regard to the State party's argument that the author and his family did not testify before the Prosecutor, the author recalls his initial submission and reiterates that they were not lawfully summoned in one investigation and that they testified in detail about the ill-treatment and the racial abuse in the second investigation, which the State party ignores in its observations.

8.9 The author reiterates his arguments, which were not addressed by the State party's observations, such as that the Prosecutor's Office did not order a forensic medical examination, the contradictions with regard to the arresting police officers in the first and second investigation and the claims by each of the six police officers to be the arresting officers. Moreover, the State party argued that the author's second complaint was dismissed due to the delay, however the author reiterates that he filed his complaint one month after the incident. The State party failed to comment on the actions by the Ombudsman who after asking for a thorough investigation, decided to stop the investigation due to unrest against Roma near Nafplio in May and June 2000.

8.10 Finally, the author claims that his case should be considered against the background of denial of justice to the Roma by the State party. He refers to the concluding observations by the Committee on the Elimination of Racial Discrimination, which recommend that the State party take vigorous measures to combat the discrimination faced by Roma in various areas, including the justice system.²⁰

Issues and proceedings before the Committee

Review of the decision on admissibility

9.1 The Committee takes note of the State party's request to reconsider its decision of 9 March 2011 regarding admissibility under article 99, paragraph 4, of its rules of procedure due to the author's failure to exhaust domestic remedies.

9.2 The Committee takes note of the State party's argument that the effectiveness of the remedy under article 48 of the Criminal Procedure Code (CPC) cannot depend on the length of the preliminary proceedings and that the Appeals Prosecutor has judicial competence. It also notes the author's comments that, irrespective of the 2010 amendments to the CPC providing for time limits of the preliminary investigation, the two investigations in his case lasted for one year and four months and three years and three months. It also notes the author's argument that he would not be heard before the Appeals Prosecutor.

9.3 The Committee reiterates its findings of 9 March 2011 (see paras. 6.1–6.6). Despite the legislative amendments of 2010, the State party has not shown how these amendments are applicable to the proceedings in the case before it. The Committee further observes that the remedy under article 48 of the CPC²¹ only becomes available after the serving of the decree of the Prosecutor of First Instance pursuant to article 47 of the CPC.²² In the instant

²⁰ See Committee on the Elimination of Racial Discrimination general comment No. 19 (1995) on racial segregation and apartheid, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 18* (A/50/18), annex VII.

²¹ See *supra* note 7.

²² Article 47 of the Criminal Procedure Code (translation provided by the State party in its observations on admissibility dated 3 July 2007): "1. The public prosecutor shall examine the complaint and, if he considers that it is not grounded on the law or is insusceptible of judicial evaluation, shall dismiss it

case, despite the then prevailing time limit of four months for preliminary investigations, the decrees of the Prosecutor of First Instance dismissing the complaints were issued after one year and four months and three years and three months respectively. The Committee reiterates its findings that the remedy under article 48 CPC did not offer the author a reasonable prospect of redress, in particular as the nature of the author's allegations would have warranted a thorough investigation with the possibility to bring an to the case before a competent, independent and impartial tribunal. It further observes that, despite a possible speedy outcome of an application under article 48 of the CPC, it considers the delays of the preliminary investigations unreasonably prolonged and the consideration of the time needed to exhaust domestic remedies includes the time that elapsed before the author could access the remedy at all. Accordingly, the Committee sees no reason to reconsider its admissibility decision and proceeds to consider the merits of the case.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's allegations that, on 12 September 1999 when he was arrested by the police, he suffered physical pain because he was kicked and psychological distress when he had a gun pointed at him and when he witnessed his relatives being beaten and having a gun pointed at them. It further notes the author's claim that he was subjected to degrading treatment and discrimination by racially motivated insults. It further notes the author's claim of the incoherencies and deficiencies of the preliminary investigations, such as that his statement was taken by fellow police officers in the second preliminary investigation and that the administrative inquiry was not sworn but informal without giving him the possibility to testify. It also notes the author's argument that the preliminary investigations were unreasonably prolonged. The Committee takes note of the State party's argument that the author's allegations of ill-treatment before and during police detention are not verified, as he did not report any injury to the prosecutor or the police. It also notes that the State party maintains that the author failed to make any complaint about the verbal abuse by racist comments he was allegedly subjected to. Finally, it notes the State party's assertion that the author's complaints were investigated in good faith.

10.3 The Committee observes that the parties have given different accounts of the incident of 12 September 1999, especially as regards the circumstances of the identity check and the alleged ill-treatment of the author. The Committee observes that, despite the length of the preliminary investigations, discrepancies between the conclusions of the three investigations have not been explained. The Committee notes the discrepancies on essential facts such as the arresting officers, in particular D.T. who was identified as the arresting officer in two of the preliminary investigations but who denied having had any contact with the author and his family, the date of the author's first complaint and the issue if police search and identity check were resisted. The State party has not explained these discrepancies and the additional administrative inquiry of 10 September 2007 did not shed any light thereon.

by a decree, which shall be served upon the complainant. 2. The public prosecutor shall have the right to carry out a preliminary investigation, either by himself or through one of the investigating officers referred to in article 33, paras. 1 and 2 and article 34. If following the examination, he is convinced that the complaint is manifestly false on the merits, he shall dismiss it according to the provision of the first paragraph of this article ..."

10.4 The Committee recalls its jurisprudence that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.²³ It further observes that it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment²⁴ and general comment No. 31 (2004) on the subject of the general legal obligation on states parties to the covenant,²⁵ as well as its constant jurisprudence,²⁶ according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by competent authorities and appropriate action must be taken against those found guilty. This applies to all elements of article 7 of the Covenant.

10.5 The Committee also recalls its general comment No. 18 (1989) on non-discrimination²⁷ according to which non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10.6 The Committee notes that the author's counsel complained orally to the police during the author's detention on 12 September 1999.²⁸ The Committee notes the author's complaint to the Misdemeanour Prosecutor of Nafplio of 27 October 1999 containing detailed allegations of ill-treatment and discrimination. On 3 December 1999, the author lodged a complaint to the Ombudsman. The Committee therefore considers that the author has made timely and reasonable attempts to complain about the alleged ill-treatment and discrimination. It also observes that the author's allegation of discrimination has not been

²³ See communication No. 30/1978, *Bleier v. Uruguay*, para. 13.3; communication No. 84/1981, *Barbato and Barbato v. Uruguay*, para. 9.6.

²⁴ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

²⁵ General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 18.

²⁶ See for example communication No. 1436/2005, *Sathasivam and Saraswathi v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4; communication No. 1589/2007, *Gapirjanov v. Uzbekistan*, Views adopted on 18 March 2010, para. 8.3; communication No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.4; communication No. 322/1988, *Rodríguez v. Uruguay*, para. 12.3.

²⁷ General comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 1.

²⁸ This information comes from the author's deposition of 3 November 2000, made in the context of the second preliminary investigation.

the object of the preliminary investigations and the State party has merely refuted it by claiming that the author has failed to mention it to his counsel while in custody.

10.7 In the light of the multiple, unexplained and serious shortcomings of the preliminary investigations, including (a) the fact that the author's complaint of 27 October 1999 was ignored by the Prosecutor of First Instance in her ruling of 10 October 2001 of the second investigation, the same instance which was investigating that very complaint; (b) the absence of any forensic medical examination; (c) the discrepancies with regard to the arresting officers which cast doubts on the thoroughness and impartiality of the investigations; (d) the alleged use of discriminatory language by investigating authorities to refer to the author or his way of life; and (e) the length of the preliminary investigations, the Committee concludes that the State party has failed in its duty to promptly, thoroughly and impartially investigate the author's claims and therefore finds a violation of the State party's obligations under article 2, paragraph 3, read in conjunction with article 7; and articles 2, paragraph 1, and 26 of the Covenant.

10.8 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Nikolaos Katsaris under article 2, paragraph 3, read in conjunction with article 7; and articles 2, paragraph 1, and 26, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 1628/2007, *Pavlyuchenkov v. Russian Federation* (Views adopted on 20 July 2012, 105th session)*

<i>Submitted by:</i>	Aleksei Pavlyuchenkov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	16 July 2007 (initial submission)
<i>Subject matter:</i>	Ill-treatment by police upon arrest and unfair trial
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issues:</i>	Prohibition of torture, cruel or inhuman and degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; right to adequate time and facilities for the preparation of a defence; right to legal assistance
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 7; article 10, paragraph 1, and article 14, paragraph 3(b), (d), (e), (g)
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2012,

Having concluded its consideration of communication No. 1628/2007, submitted to the Human Rights Committee by Mr. Aleksei Pavlyuchenkov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 16 July 2007, is Aleksei Pavlyuchenkov, a citizen of the Russian Federation born in 1977. He claims to be a victim of a violation by the Russian Federation of his rights under article 2, paragraph 3; article 7; article 10,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

paragraph 1, and article 14, paragraph 3(b), (d), (e) and (g) of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is unrepresented.

The facts as presented by the author

2.1 On 14 August 2001, the author was convicted of theft and fraud and sentenced to a suspended sentence of five years and two months by the Krasnokholmsk District Court of Tver province. On 14 October 2004, he was convicted of murdering Ms. V. by the Tver Regional Court, and sentenced to 18 years' imprisonment to be served in a special colony. This punishment was partly appended to the first suspended sentence and the author was sentenced to a total of 18 years and 6 months' imprisonment in a special colony. On 17 November 2005, he was convicted of murdering Ms. S. by the Aleksandrovsk City Court of Vladimir province, and sentenced to 20 years' imprisonment in a special colony. The author submits that his complaint to the Committee is related to his second conviction by the Tver Regional Court dated 14 October 2004.

2.2 The author claims that at around 1 a.m. on 13 May 2004, he was arrested in Bulatovo village by officers of the Criminal Investigation Department of the Kashin and Bezhetsk District Section of Internal Affairs (DSoIA) of Tver region on suspicion of murdering Ms. V. While being transported to the DSoIA in a minivan, he was told that he was "lucky that Mr. Sh. had not participated in his arrest". The author had heard from Ms. V. that her relative Sh. was an officer of the Ministry of Interior, but did not know at that time exactly where he worked.

2.3 The author submits that approximately one hour later, he was taken to the DSoIA to see a senior investigator of the Bezhetsk Inter-district Prosecutor's Office and two DSoIA Criminal Investigation Department officers. They informed the author that there was information implicating him in the murder and suggested that he make a voluntary statement. The author claims that he had not slept the night before (having been drinking alcohol), then worked full time on 12 May 2004 and, by the time he was arrested, had not slept for at least 48 hours. On these grounds, he refused to make a statement and requested time to sleep and think everything over. Two criminal investigation department officers threatened him that if he did not confess, he would suffer "unbearable conditions of detention pending trial" because the victim's relative Sh. worked at the DSoIA. They also told him that they would be conducting the investigation "awaiting the return of Sh. from a business trip, so that [upon return] he could avenge his relative's death". Moreover, the author was told, another person being held on suspicion of committing the same murder, Mr. B., had already confessed by shifting the blame onto him and was already asleep in the temporary confinement cell (TCC).

2.4 The author submits that he subsequently agreed to make a statement and requested an attorney. The DSoIA officers explained that it would be difficult to find an attorney in the middle of the night and suggested that he gave an "explanation" – an oral statement not recorded in an interrogation report. They promised that this information would not be used in the indictment. The author claims that he confessed to the murder, also implicating B., in order to be allowed to sleep and to put himself in order.

2.5 The author claims that after providing the "explanation", he was taken to the Bezhetsk TCC and subjected to a search by two TCC duty officers. Allegedly, both officers were heavily intoxicated and swore at the author as they conducted the search, cut his clothes off with a knife and made a show of their superiority. The author refused to sign a search log and demanded a pen and paper to file a complaint. He was then threatened with the use of physical force and with being put in a situation where he might face sexual aggression. Finally, after he repeatedly refused to sign the log, he was taken to a cell.

2.6 The author submits that he was held in this detention facility for the following periods: 13–25 May 2004, 6–16 June 2004, 6–13 July 2004, 4–24 August 2004 and 8 September 2004–19 October 2004. The author submits that two-thirds of the cell (approximately 6 square metres) was taken up by a solid wooden plank bed without individual dividers. The cell was occupied by two to eight persons at a time. There was no separation between the living area and the toilet, wash-basin and a garbage bin. The author claims that, because of the unsanitary conditions of the cell and lack of privacy, he could not properly prepare for his defence. The only window (approximately 0.3 x 0.4 metres) was permanently shut and blocked by a metal plate; the artificial light was insufficient to read and write by. The central ventilation was out of order for the duration of the author's detention. The TCC area designated for detainees' walks had been turned into an open-air cage for the DSoIA dogs. As a result, all walks for the detainees were abolished. The author was allowed to take a shower only twice during his detention in the TCC. Because of the lack of hygiene and broken ventilation, the cell was infested with lice, bed-bugs, wood-lice, ticks and other insects. The author was sharing the cell and food plates with detainees who had been diagnosed with hepatitis and tuberculosis.

2.7 The author further submits that while being detained in the TCC, he was constantly reminded about Sh.'s awaited return from a business trip and he took this threat seriously. The author repeatedly requested to be informed about the TCC internal regulations and his rights. On one occasion the DSoIA director accepted this request and took the author to the announcements board in the corridor, but handcuffed him beforehand so tightly that he could not withstand the pain for more than five minutes. Among the few things that the author managed to make out before he had to give up on studying the regulations was that they were outdated and displayed only in part. He filed several complaints about the conditions of detention which remained unanswered; in order to secure a meeting with a prosecutor in charge of supervision of the TCC, he went on hunger strike. The author claims that he requested to be taken to a dentist several times for acute toothache but these requests were refused due to the unavailability of transport and armed guards to escort him.

2.8 On 14 July 2004, the author filed a complaint to the Tver Regional Court requesting his transfer from the Bezhetsk TCC. On 20 July 2004, the Tver Regional Court forwarded this application to the Bezhetsk Inter-District Prosecutor's Office. On 28 July 2004, the application was examined by the Deputy Bezhetsk Inter-district Prosecutor and the author's request for transfer was rejected. On 5 August 2004, the author filed a complaint about conditions of detention and violation of his rights with the "Tvoy vikor" ("Your choice") organization. On 17 August 2004, the author was informed that the Prosecutor's Office of Bezhetsk District of Tver Region had examined his complaint filed with "Tvoy vikor" and found some violations of the requirements for detention facilities. The letter reads: "In view of existing violations of conditions of detention in the TCC, the DSoIA leadership is taking measures to find financial resources to bring these conditions into conformity with the requirements".

2.9 The author submits that on 30 September 2004, when he and B. were about to be transported to the court, Sh., who was intoxicated and armed, and was among the guards who escorted him, attacked the author, took him by the throat and started to strangle him, saying "so what, did you cut [her]?..." The chief guard allegedly pulled Sh. back, saying "not now, do it after the court hearing".

2.10 The author claims that his ex-officio attorney's services were inadequate because she did not complain about Sh.'s actions, despite the fact that the author stated in court that he had been attacked by the victim's relative, who was working in the DSoIA, and requested the court to ensure his safety and integrity. During the trial, the co-defendant,

Mr. B., stated that his statement at the pretrial stage was obtained at night and with the use of illegal methods of interrogation.¹ According to the author, this important information was not taken up by his attorney, who failed, for example, to request the examination in court of those officers who had conducted Mr. B.'s interrogation. Around 10 prosecution witnesses never appeared before the court despite the author's attempts to summon them. He did not have adequate time or facilities for the preparation of his defence.

2.11 The author further claims that his numerous requests to obtain copies of his criminal case file were also denied. He submits several letters from courts stating that the author must pay a fee in order to obtain copies of his criminal case file. The author argues that this violates his rights and prevents him from pursuing his claims with international organizations.

2.12 On 7 February 2005, the Judicial College on Criminal Cases of the Supreme Court rejected the author's appeal on cassation of the Tver Regional Court's judgment of 14 October 2004. The author's appeal for a supervisory review of this judgment was rejected by the Supreme Court and by the Deputy Chairperson of the Supreme Court on 29 September 2005 and 3 August 2006 respectively.

The complaint

3. The author claims that the above-described facts demonstrate that the State party violated his rights as guaranteed under article 2, paragraph 3; article 7; article 10, paragraph 1; article 14, paragraphs 3(b),(d),(e) and (g), of the Covenant.

State party's observations on admissibility and merits

4.1 On 13 June 2008 and 4 July 2008, the State party provided its observations. The State party submits that Mr. Pavlyuchenkov was detained on 13 May 2004, at 4.05 a.m. Mr. Pavlyuchenkov was explained his rights under article 46 of the Criminal Procedure Code of the Russian Federation and under article 51 of the Constitution, and signed a statement confirming this. The State party denies that Mr. Pavlyuchenkov was interrogated during that night in the absence of a defence lawyer.

4.2 The State party submits that the author's complaint about ill-treatment by the police officers was investigated by the prosecutor, who on 22 August 2007 refused to open a criminal case in the absence of a corpus delicti. This decision was upheld by the Bezhetsk City Court on 17 December 2007. The author never appealed this decision.

4.3 The State party submits that the first time the author was interrogated was on 13 May 2004 at 9.05 a.m. He was explained his rights, and was also told that he was suspected of murdering Ms. V. Mr. Pavlyuchenkov refused to talk, citing article 51 of the Constitution. No complaints were filed by the author at that time.

4.4 The State party submits that on 14 May 2004, Mr. Pavlyuchenkov volunteered to provide information, and admitted that he had attacked Ms. V., but denied killing her. This was done with the participation and in the presence of a defence lawyer, Ms. I. The author was again told of his procedural rights.

¹ The trial transcript reads: B. stated in court that he was sitting next to a Criminal Investigation Department officer who was continually nudging him because B. was falling asleep in the middle of interrogation [as he was heavily intoxicated]. "At the time of interrogation I was in a state ... that I cannot describe ... I was told that I needed to add that I had been the first to take out the knife and that I had seen how Pavlyuchenkov was killing V. That's what I wrote. I was writing down what the Criminal Investigation Department officers were telling me to write".

4.5 The State party submits that on 20 May 2004, in the presence of his defence lawyer, the author was officially charged with the murder of Ms. V. On 12 August 2004, the author and his lawyer, Ms. I., acknowledged that they were acquainted with the materials of the criminal case. There were no complaints of ill-treatment or otherwise, either by Mr. Pavlyuchenkov or his lawyer.

4.6 The State party submits that court hearings started on 27 September 2004. On that date, the court postponed the initial hearing, upon a request from Mr. Pavlyuchenkov, who claimed he needed more time to study the case materials. The next court hearing, on 30 September 2004, was also postponed, because Mr. Pavlyuchenkov told the court that he was “shaking, and ... afraid of the relative of Ms. V.”.

4.7 The State party submits that on 25 October 2004, he was given a copy of the transcript of the court hearings. Mr. Pavlyuchenkov had no complaints about the document, nor did he complain about it in his appeal.

4.8 The State party admits that not all witnesses were questioned during the court hearings. Mr. Pavlyuchenkov requested that only two witnesses be questioned – V.P.N. and A.V.N. Mr. V.P.N. was questioned on 1 October 2004. Mr. A.V.N. was summoned to testify, but did not appear in court. Another witness, Mr. P., was serving in the military at that time and was also unable to testify.

4.9 The State party submits that Ms. I. vigorously defended Mr. Pavlyuchenkov both during the investigation and during the court hearings, as is obvious from the transcript of the court hearings. Ms. I. also represented the author in his appeal. The author never complained about his lawyer and has not requested a different lawyer. The appeal contains no complaints about Ms. I.’s representation. As to the author’s complaint that he did not personally participate in the supervisory appeal procedure in the Supreme Court, the State party submits that, according to article 406 of the Criminal Procedure Code, his participation would have been necessary only if the Court had granted the supervisory appeal. In the author’s case, the supervisory appeals were denied on 29 September 2005 and 3 August 2006.

4.10 Regarding the author’s complaint that the courts refused to provide a copy of the criminal case file, the State party submits that the documents concerned had already been provided to the author. The author was informed that additional copies would be provided only if he paid for the copying. However, the Constitutional Court of the Russian Federation decided that, upon request, payment for additional copies of the court materials might be reduced or waived. No such request was submitted by Mr. Pavlyuchenkov. Moreover, the author did not complain about this issue in his appeal.

4.11 The State party submits that the court correctly designated the type of penitentiary institution where Mr. Pavlyuchenkov would serve his sentence, in view of his criminal record. According to article 299 of the Criminal Procedure Code, such decisions are left to the court’s discretion to consider during the sentencing. Sentencing occurred on 14 October 2004 in the presence of Mr. Pavlyuchenkov. The State party therefore submits that no provisions of article 14 of the Covenant were violated.

4.12 The State party further submits that the author’s complaints about the conditions in the detention facilities are also ill-founded. Those conditions were in accordance with the rules of detention in the temporary confinement facilities dated 26 January 1996, according to which each detained person is provided a bed space. Additionally, according to paragraph 6.2 of the rules, the cleaning of the facilities must be carried out by detainees themselves. The ventilation was broken in September 2004, but was repaired on 20 September 2004 after Mr. Pavlyuchenkov complained. He was also able to use the shower regularly. Also, contrary to Mr. Pavlyuchenkov’s claims, he was taken to the dentist on 24 May 2004.

Author's comments on the State party's observations

5.1 In his letters dated 22 July 2008 and 29 July 2008, the author provides his comments on the State party's observations. He reiterates that the conditions of his detention were unacceptable. The State party indicated that the conditions in the detention facility were inspected on 11 April 2005 and no violations were found. The author submits that he was detained in the facility during 2004. The author further submits that he did not have enough light to read by and that the ventilation was not functioning properly.

5.2 The author submits that according to the standards of detention facilities dated 25 January 1971, the toilet should have been separate from the rest of the cell. The author further submits that the Federal Law "On detention of persons suspected or charged with crimes" dated 1 January 1998 provides that the national legislation must comply with the requirements of international standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners.

5.3 The author reiterates his position that he was arrested at 1 a.m. on the night between 12 and 13 May 2004, not 5 a.m. on 13 May, as submitted by the State party. He further claims that he was insulted by the officers who damaged his clothing. Further to these violations, Mr. Pavlyuchenkov filed a number of complaints to the Prosecutor's Office. On 14 July 2004, he asked to be transferred to a different detention facility. The author also claims that a number of his complaints never reached the intended addressee.

5.4 Refuting the State party's claim that he was taken to the dentist on 24 May 2004, the author submits that on that date he was taken for a blood test as part of the investigation.

5.5 As to the State party's contention that he was provided with qualified legal assistance, he reiterates his previous allegations and states that he was convinced by Ms. I. that it would be futile to refuse legal assistance, because in such cases legal representation was mandatory. Ms. I. should have complained about the violations of the author's rights, but did not do so. The author further claims that because of his limited education, he did not know how to complain about his lawyer. The author claims, however, that he did complain about Mr. I. to the Judicial Department of the city of Tver, to no effect.

5.6 The author submits that on 18 July 2008, he became aware of the fact that he owed 6,000 roubles for the legal assistance provided by Ms. I. The author claims that he was never told that he could be held accountable to pay for legal assistance. He argues that no reference was made to such payment during the conviction on 14 October 2004 and in later court documents. The author submits that this violates the laws of the Russian Federation and article 14, paragraph 3(d) of the Covenant.

5.7 The author reiterates that he had insufficient time to prepare for his trial. He further claims that his incomplete education did not allow him to fully understand the materials of his case. The author further submits that the court hearings were postponed twice, but that this was because he was afraid of relatives of Ms. V., who were "putting pressure" on him. He claims that Mr. Sh., as a relative of Ms. V., should not have been one of the guards who escorted him. The author refers to the incident that occurred on 30 September 2004, when Mr. Sh., while drunk, "physically pressured" him.

5.8 The author further submits that when he requested V.P.N. to testify at the court, he meant to request Va.P.N. to be questioned, and not Vi.P.N. The author also submits that that Mr. P. should have been summoned to court, even if he was serving in the military at that time.

5.9 The author reiterates that despite his numerous requests, he was not provided with copies of his criminal case file. The author claims that on 14 February 2007, he requested the Bezhetsk City Court to provide copies of the court materials without payment, citing his inability to pay. The court responded by saying that Mr. Pavlyuchenkov could send his

representatives to the Tver Regional Court, where they could make copies in person. The Tver Regional Court agreed to provide copies only after the payment. His complaint to the Supreme Court dated 17 September 2007 was also rejected.

5.10 The author further claims that he was convicted on the basis of the inadmissible evidence provided by Mr. B. He claims that Mr. B. was drunk during the questioning and had not slept for more than two days.

State party's further observations

6.1 On 31 March 2009, the State party provided additional observations. It refutes the author's allegations of ill-treatment during the initial detention. The State party reiterates its position that Mr. Pavlyuchenkov received legal assistance of good quality from Ms. I.

6.2 The State party claims that according to article 50, paragraph 5, of the Criminal Procedure Code, the Russian federal budget covers expenses for a lawyer appointed by a court, an investigator or a prosecutor. However, article 132, paragraph 2, of the Criminal Procedure Code provides that the convicted person must reimburse expenses, unless (a) the person was acquitted, or (b) the person who was suspected or charged with a crime refused legal assistance but the lawyer participated nevertheless on the basis of the court order. Mr. Pavlyuchenkov did not refuse the assistance of the lawyer; the court therefore decided that the author must reimburse 6,000 roubles² to the federal budget.

6.3 The State party further submits that Mr. Pavlyuchenkov was fully informed about this court decision. On 21 February 2005, the Tver Regional Court sent a copy of the relevant court decision dated 18 October 2004. The author did not complain about this decision.

6.4 The State party further refutes the author's claim that he did not have sufficient time to prepare his defence. Mr. Pavlyuchenkov's request for additional time to study case materials was granted by the court, and no complaints regarding this issue were filed by the author.

6.5 Regarding the witnesses, the State party claims that V.P.N. was questioned in the court, as requested by the author. However, according to the trial transcript, the name of the person questioned was VI.P.N. The author did not object to this witness. Mr. A.V.N. and Mr. P. could not testify in court, but their absence did not affect "the completeness and objectivity of the court hearings".

Further comments by the author

7.1 On 10 August 2009, the author provided further comments. He reiterates his position that he was arrested earlier, at around 1 a.m. on 13 May 2004, and ill-treated during his initial detention. He also states that the reason he did not complain about a payment of 6,000 roubles that he owes to the State was because he only learned about this on 18 July 2008. The author submits that he still does not have a copy of the court decision concerned.

7.2 The author further reiterates that he was convicted on the basis of the testimony of Mr. B., which was obtained in violation of Mr. B.'s rights. The author claims that the court failed to verify that this information was obtained legally. He further submits that he did not have nearly enough time to become acquainted with the 819 pages of the case materials.

² According to the Central Bank of the Russian Federation, the exchange rate on 14 May 2012 was 1 rouble = 0.033 USD.

7.3 In his letter dated 31 August 2009, the author provides a detailed calculation showing that the Russian Federation owes him compensation for moral harm, his expenses for obtaining court documents, and for the assistance of his lawyer, for a total of 321,000 roubles. Additionally, the author asks the State party to provide a full copy of his criminal case file, including all copies of his cassation and supervisory appeals. The author is also asking the Committee to recommend that the State party reconsider the conviction dated 14 October 2004 by the Tver Regional Court.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With respect to the alleged violations of article 2, paragraph 3; article 7; and article 14, paragraph 3(d), (g), of the Covenant, the Committee notes the State party's argument that the author did not raise these claims before the domestic courts, either during the initial court hearings or subsequently, during the cassation appeal. The Committee notes that the author has filed a number of complaints with the prosecutor's office and the office of the human rights representative under the President of the Russian Federation. The Committee recalls its jurisprudence, according to which the term "all available domestic remedies" refers in the first place to judicial remedies.³ Noting that the author has failed to raise issues related to article 2, paragraph 3; article 7; and article 14, paragraph 3 (d), (g), of the Covenant before domestic courts, the Committee concludes that this part of the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee notes the author's claims under article 14, paragraph 3 (e), that his requests to call witnesses for testimony were declined by the court. The Committee observes that the author's allegations under article 14, paragraph 3 (e) of the Covenant, are linked primarily to the evaluation of facts and evidence and recalls its jurisprudence, according to which it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice.⁴ The Committee observes that the materials before it, including the transcripts of court hearings, do not suggest that the impartiality of the court was affected, the principle of equality of arms was violated or that the fairness of the author's trial had been otherwise undermined. It therefore concludes that the author failed to substantiate his claim under

³ See, inter alia, communication No. 397/1990, *P.S. v. Denmark*, decision of inadmissibility adopted on 22 July 1992, para. 5.4; communication No. 1575/2007, *Aster v. Czech Republic*, decision of inadmissibility of 27 March 2009, para. 6.2.

⁴ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (art. 14), para. 26; see also, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; communication No. 1616/2007, *Manzano v. Colombia*, decision of inadmissibility adopted on 19 March 2010, para. 6.4; communication No. 1532/2006, *Sedljar and Lavrov v. Estonia*, decision of inadmissibility adopted on 29 March 2011, para. 7.3.

article 14, paragraph 3(e), of the Covenant, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

8.5 As to the author's allegation that neither he nor his counsel had sufficient time to become acquainted with the materials of the criminal case and therefore he was not given the opportunity to prepare his defence, in violation of article 14, paragraph 3(b), of the Covenant, the Committee notes the detailed information provided by the State party regarding the period of time given to the author and his counsel to familiarize themselves with the case materials, together with the fact that the court hearing was postponed to accommodate the author. In view of this information, the Committee considers that this claim is insufficiently substantiated for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.6 The Committee considers that the author's allegations under article 10, paragraph 1, of the Covenant, have been sufficiently substantiated, for purposes of admissibility. The Committee also notes the State party argument that the author did not raise this claim during the court hearings. The Committee, however, notes that the author did file a number of complaints to the officers in charge of the detention facility, and asked the prosecutor's office and the Tver Regional Court to transfer him and Mr. B. to a different detention facility. The Committee notes that no other remedies were available to the author while he was in detention.⁵ In light of the information provided by the parties, the Committee considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol regarding his claim under article 10, paragraph 1, of the Covenant, and proceeds to the examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 Regarding the conditions of detention in the Bezhetsk TCC, the Committee notes the specific information received from the author, in particular, that the detention facility did not have a functioning ventilation system, adequate food or proper hygiene. In addition, the Committee notes the author's allegations that he remained inside his cell at all times, with no opportunity for outdoor exercise. The author had to eat his meals and use the toilet in cramped conditions in one room. The Committee further notes that the State party simply refers to the conformity with national standards, without providing detailed explanations regarding the conditions of the author's detention, or of measures taken by the State party to investigate the conditions of detention and provide the necessary remedies. The Committee finds that holding the author in the conditions as described by the author entailed a violation of his rights under article 10, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the Russian Federation of article 10, paragraph 1, of the Covenant.

⁵ See the judgment of the European Court of Human Rights in the case of *Ananyev and Others v. Russia* (applications nos. 42525/07 and 60800/08, judgment of 10 January 2012), in which the Court expressed its view that "... the Russian legal system does not dispose of an effective remedy that could be used to prevent the alleged violation or its continuation and provide the applicant with adequate and sufficient redress in connection with a complaint about inadequate conditions of detention." (para. 119 of the judgment).

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation to the author for the violations suffered. The State party is also under an obligation to take appropriate and sufficient measures to prevent similar violations in the future by bringing its prison conditions into compliance with its obligations under the Covenant, taking account of the United Nations Standard Minimum Rules for the Treatment of Prisoners⁶ and other relevant international norms.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

⁶ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

**F. Communication No. 1744/2007, *Narrain et al. v. Mauritius*
(Views adopted on 27 July 2012, 105th session)***

<i>Submitted by:</i>	Devianand Narrain et al.** (represented by counsel, Rex Stephen and Nilen D. Vencadasmy)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Mauritius
<i>Date of communication:</i>	16 November 2007 (initial submission)
<i>Subject matter:</i>	Requirement for prospective candidates of elections to the National Assembly to identify themselves as members of one of the four categories of the Mauritian population
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; incompatibility with the provisions of the Covenant; abuse of the right of submission
<i>Substantive issues:</i>	Right to take part in political activity; freedom of thought, conscience and religion; right to equality before the law
<i>Articles of the Covenant:</i>	18; 25; 26
<i>Articles of the Optional Protocol:</i>	3 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2012,

Having concluded its consideration of communication No. 1744/2007, submitted to the Human Rights Committee on behalf of Devianand Narrain et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the present communication, dated 16 November 2007, are Devianand Narrain (born in 1960), Adrien Georges Laval Legallant (born in 1960), Jean François Chevathyan (born in 1960), Ian Harvey Jacob (born in 1975), Paveetree Dholah (born in

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

** Adrien Georges Laval Legallant; Jean François Chevathyan; Ian Harvey Jacob; Paveetree Dholah; Rolando Denis Marchand; Dany Sylvie Marie; Roody Yvan Pierre Muneean; and Ashok Kumar Subron.

1959), Rolando Denis Marchand (born in 1966), Dany Sylvie Marie (born in 1973), Roody Yvan Pierre Munean (born in 1985) and Ashok Kumar Subron (born in 1963). They are all Mauritian citizens and members of a political party called Rezistans ek Alternativ. The authors claim to be victims of a violation by the State party of articles 18, 25 and 26 of the Covenant. They are represented by counsel, Rex Stephen and Nilen D. Vencadasmy.

1.2 On 6 October 2009, at its ninety-seventh session, the Committee declared the communication admissible insofar as it raised issues under articles 25 and 26 of the Covenant.

The facts as presented by the authors

2.1 The authors are members of a registered political party called Rezistans Ek Alternativ (Resistance and Alternative) and in that capacity they presented their candidacies for the general election to the National Assembly held on 3 July 2005.

2.2 On 30 May 2005, the authors submitted their nomination papers to the electoral authority of their constituencies. Their nomination papers were duly filled in, except for item 5 of part II, according to which they were requested to declare to which one of the four communities of the Mauritian population they belonged to. The First Schedule to the Constitution establishes a four-fold categorization of the Mauritian population: Hindu; Muslim; Sino-Mauritian; or General Population, for those who do not appear, from their way of life, to belong to one of the three communities.¹

2.3 The Constitution of the State party provides that the Assembly shall consist of 70 members.² The First Schedule to the Constitution, in paragraph 3(1), creates an obligation on every candidate in any general election to declare “in such manner as may be prescribed which community he belongs to and that community shall be stated in a published notice of his nomination”. Moreover, paragraph 5 of the First Schedule to the Constitution holds that eight seats will be allocated under the “Best Loser System”. These eight seats will be distributed among the most successful candidate belonging to the appropriate community, as well as the most successful political party.³ Regulation 12, paragraphs 4 and 5, of the

¹ Paragraph 3 (4) of the First Schedule to the Constitution reads as follows: “For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those 3 communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community.”

² According to the First Schedule to the Constitution, the 70 members of the National Assembly are elected as follows: (a) 62 members are returned on the basis of the principle of “first past the post” (20 constituencies returning three members each and one constituency in the autonomous region of the Island of Rodrigues returning two members); and (b) the remaining eight members are seats allocated under a mechanism known as the Best Loser System.

³ Paragraph 5 (3-4) of the First Schedule to the Constitution reads as follows: “(3) The first 4 of the 8 seats shall so far as is possible each be allocated to the most successful unreturned candidate, if any, who is a member of a party and who belongs to the appropriate community, regardless of which party he belongs to. (4) When the first 4 seats (or as many as possible of those seats) have been allocated, the number of such seats that have been allocated to persons who belong to parties, other than the most successful party, shall be ascertained and so far as is possible that number of seats out of the second 4 seats shall one by one be allocated to the most successful unreturned candidates (if any) belonging both to the most successful party and to the appropriate community or where there is no unreturned candidate of the appropriate community, to the most successful unreturned candidates belonging to the most successful party, irrespective of community.” Paragraph 5 (8) of the First Schedule to the Constitution: “The appropriate community means, in relation to the allocation of any of the 8 seats, the community that has an unreturned candidate available (being a person of the appropriate party, where the seat is one of the second 4 seats) and that would have the highest number

National Assembly Election Regulations 1968 provides that every candidate of a general election must make and subscribe to, in his nomination paper, inter alia, a declaration “as to which of the Hindu, Muslim, Sino-Mauritian or General Population he belongs”, and that in the event such a declaration is not made the nomination shall be deemed to be invalid.

2.4 In their nomination papers, the authors did not make the required declaration. They claim that they were, have always been, and still are, unable to categorize themselves in the prescribed compartments, i.e. as belonging either to the Hindu, Muslim, Sino-Mauritian or General Population community. They further claim that they were and still are unaware of the criteria “way of life”, as suggested by the First Schedule to the Constitution, that would qualify them to be or not to be of the Hindu, Muslim or Sino-Mauritian community. They remain consequently unable to decide whether they could classify themselves in the residual community called General Population, the more so that they were equally unaware of the criteria “way of life” that would qualify them to be or not to be in the General Population community. The authors add that since the population census of 1972, the four-fold categorization of the population has no longer been used for censuses.

2.5 On 30 May 2005, the authors’ nominations and candidatures were declared invalid on the ground of their failure to comply with regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968.

2.6 On 10 June 2005, the Supreme Court ordered the electoral authorities to insert the authors’ names on the list of eligible candidates. The Supreme Court decided that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 is repugnant to Section 1 of the Constitution proclaiming that Mauritius is a democratic State. The Supreme Court further held that the right to stand as a candidate at general elections is so fundamental for the existence of a true democracy that it cannot be tampered with, and that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 had been unlawfully enacted. As a result, the authors could stand as candidates at the general election on 3 July 2005. However, none of them was successfully returned or eligible to be considered under the Best Loser System.

2.7 In the light of the Supreme Court decision of 10 June 2005 in favour of the authors, the Electoral Supervisory Commission started proceedings before the Supreme Court asking for direction as to how to apply the provisions of paragraph 3 of the First Schedule to the Constitution to prospective candidates who fail to declare on their nomination paper which community they belong to. Counsel for the authors submitted an amicus curiae brief in these proceedings. On 10 November 2005, the Supreme Court ruled that there is a legal obligation for prospective candidates at general elections to declare on their nomination papers the communities to which they belong, failing which their nomination papers would be invalid.

2.8 The authors, who were not a party to the case, challenged the Supreme Court judgment of 10 November 2005 under a procedure known as *tierce opposition*. They claimed that this judgment infringed their constitutional rights. On 7 September 2006, the

of persons (as determined by reference to the results of the published 1972 official census of the whole population of Mauritius) in relation to the number of the seats in the Assembly held immediately before the allocation of the seat by persons belonging to that community (whether as members elected to represent constituencies or otherwise), where the seat was also held by a person belonging to that community: Provided that, if in relation to the allocation of any seat, 2 or more communities have the same number of persons as aforesaid preference shall be given to the community with an unreturned candidate who was more successful than the unreturned candidates of the other community or communities (that candidate and those other candidates being persons of the appropriate party, where the seat is one of the second 4 seats).”

Supreme Court dismissed the authors' application for tierce opposition. It held that the tierce opposition procedure does not apply in constitutional matters, and that the authors had not shown that they suffered real prejudice, actual or potential. It also noted that the authors could file an application for special leave to the Judicial Committee of the Privy Council against the Supreme Court's determination in the 10 November 2005 ruling. On 25 September 2006, the authors sought from the Supreme Court leave to appeal to the Judicial Committee of the Privy Council. On 14 March 2007, the Supreme Court refused to grant leave to appeal, under section 81, paragraphs 1 (a) and 2 (a), of the Constitution, holding that the judgment of 7 September 2006 did not concern the interpretation of any provisions of the Constitution. It recalled that the applicants, in order to make an application by way of tierce opposition had to do so by an *action principale*, i.e. a plaint with summons, and had to show that they had suffered prejudice, actual or potential.

The complaint

3.1 The authors claim that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968, to the extent that it invalidates the nomination of a candidate to a general election who does not declare to which of the Hindu, Muslim, Sino-Mauritian or General Population communities he allegedly belongs, violates article 25 of the Covenant. They add that paragraph 3 (1) of the First Schedule to the Constitution, in imposing an obligation on a candidate to a general election to declare the "community" he is supposed to belong to as interpreted by the Supreme Court, also violates article 25. The authors submit that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 and paragraph 3 (1) of the First Schedule to the Constitution, individually or cumulatively, violate article 25, inasmuch as they create objectively unreasonable and unjustifiable restrictions on their right to stand as candidates and be elected at general elections to the National Assembly.

3.2 The authors maintain that the criterion of a person's way of life, which is the basis of the four-fold classification of the State party's population, is not only vague and undetermined but is also totally unacceptable in a democratic political system. It cannot form the basis of a sanction, which leads to curtailing the authors' rights under article 25. Compelling citizens to declare themselves as belonging to a specific community could lead to dangerous dynamics. They further maintain that the absence of categorization of candidates does not affect the operation of the Best Loser System, for which it was designed, as the only consequence for a candidate without categorization would be to lose his entitlement to be returned under that system.

3.3 The authors argue that by sanctioning persons who are unable or unwilling to categorize themselves on the basis of an arbitrary criterion, such as a person's way of life, the law unjustifiably discriminates against them. They maintain that this would amount to a violation of article 26 of the Covenant.

3.4 The authors claim that the compulsory classification requested by the State party for purposes of elections to the National Assembly deprives them, in violation of article 18 of the Covenant, of their right to freedom of thought, conscience and religion.

State party's observations on admissibility

4.1 On 22 April 2008, the State party requested that the admissibility of the communication be considered separately from the merits. It recalls that the authors were not prevented from standing as candidates for the general elections of June 2005. It considers that the communication should be declared inadmissible for the authors' failure to exhaust all domestic remedies, for incompatibility with the provisions of the Covenant and for abuse of the right of submission.

4.2 The State party submits that the authors failed to exhaust domestic remedies, as they did not apply to the Supreme Court under section 17 of the Constitution, available for any person alleging that his fundamental rights or freedoms have been contravened. The State party explains that a Supreme Court decision under section 17 of the Constitution can thereafter be appealed to the Judicial Committee of the Privy Council. The State party recalls that the authors' application by way of tierce opposition failed because this procedure does not apply in constitutional matters and the authors failed to show that they suffered any real prejudice, actual or potential. It further recalls that the authors' application to seek leave to appeal to the Judicial Committee of the Privy Council was dismissed on the same grounds.

4.3 The State party contends that the communication is incompatible with the provisions of the Covenant. It explains the rationale behind the complex election system, which is to guarantee the representation of all ethnic communities. Therefore, it believes that what is being sought in the present communication is itself incompatible with the provisions of the Covenant, since, in view of the multi-ethnic and multi-religious composition of the State party's population, the abolishment of the requirement for a prospective candidate to declare the community to which he belongs to could in fact result in discrimination on the grounds of race, religion, national or social origin. It also notes that the current election system is being reviewed by the Government. The Prime Minister has stated that he considers the Best Loser System to have outlived its usefulness, even though it has served well.

4.4 The State party argues that the communication amounts to an abuse of the right of submission. It recalls that the authors could stand as candidates at the general election in 2005 and were thus not denied that right. Moreover, they are not candidates for any pending election, i.e. there is no live issue before the Committee now.

Authors' comments on the State party's observations on admissibility

5.1 On 19 June 2008, the authors contested the State party's observation on their failure to exhaust domestic remedies and underlined that an application under section 17 of the Constitution would have been futile. As the Committee concluded in *Gobin v. Mauritius*, in the absence of the incorporation of the provisions of the Covenant into national law, the domestic courts do not have the power to review the Constitution to ensure its compatibility with the Covenant.⁴ The authors further underline that the Supreme Court, in its rejection of the authors' application for leave to appeal to the Judicial Committee of the Privy Council, itself held that the judgement did not concern the interpretation of any provisions of the Constitution.

5.2 The authors maintain that the State party implicitly admits to the inherent flaws and defects of the Best Loser System it seeks to defend. They argue that the Best Loser System does not afford fair and adequate representation, as the allocation of the eight additional seats in the National Assembly is based on census figures of 1972 and no longer reflects reality. They add that the imposition of classification for prospective candidates imposes an unreasonable restriction on them.⁵ The criterion which forms the basis of the classification

⁴ Communication No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.2.

⁵ See general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V), para. 4.

is “way of life”, which is not defined by the Constitution or by law. It is vague, amorphous and cannot constitute the basis for determining the eligibility of a prospective candidate.⁶

5.3 The authors contest the State party’s argument that their communication is an abuse of the right of submission, inasmuch as their right to stand in the general elections of June 2005 was derived from a court decision, which was subsequently overruled.

Additional observations by the State party

6. On 5 August 2008, the State party submitted that the communication *Gobin v. Mauritius*⁷ is to be clearly distinguished from the present communication. In the present matter the authors allege violations of their fundamental rights pertaining to freedom of expression, religion, culture and conscience, which are guaranteed under sections 11 and 12 of the Constitution. The means for redress whenever fundamental rights are being or are likely to be contravened cannot be but by way of a claim under section 17 of the Constitution. Furthermore, following the refusal of leave to appeal to the Judicial Committee of the Privy Council in relation to the judgment of the Full Bench of the Supreme Court delivered on 7 September 2006, the authors did not avail themselves of a further remedy inasmuch as they did not apply for special leave to the Judicial Committee of the Privy Council as provided for under section 81, paragraph 5, of the Constitution.⁸

Decision of the Committee on admissibility

7.1 On 6 October 2009, at its ninety-seventh session, the Committee considered the admissibility of the present communication.

7.2 The Committee noted the State party’s argument that the authors failed to exhaust domestic remedies, as they neither applied to the Supreme Court under section 17 of the Constitution, nor sought leave to appeal to the Judicial Committee of the Privy Council to address their claim pertaining to their freedom of thought, conscience and religion.

7.3 With regard to the authors’ claim under article 18 of the Covenant, the Committee observed that the State party’s Constitution contains a similar provision, and that claims alleging its violation can be raised before the Supreme Court and the Judicial Committee of the Privy Council, as noted by the State party. The Committee noted that the authors failed to lodge a constitutional complaint before the Supreme Court with regard to the alleged violation of their freedom of thought, conscience and religion, and concluded that the authors failed to exhaust domestic remedies to address their claim under article 18 of the Covenant. This claim is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

⁶ See *Carrimkhan v. Tin How Lew Chin and ors* of 2000 (SCJ 264), in which a local court held that “way of life may depend on a series of factors – the way one dresses, the food one eats, the religion one practises, the music one listens to, the films one watches. ... The issue further arises as to how the judge can determine the way of life of a citizen unless he becomes Big Brother in G. Orwell’s novel *1984* and watches how a citizen leads his private life. One may also change one’s way of life from one election to the other. Our attention was drawn to the fact that a way of life can also be dependent on class distinction, for a rich Hindu and a rich Sino-Mauritian may have a similar way of life, depending on their financial means, whereas a rich Hindu and a poor Hindu may lead altogether different ways of life.”

⁷ Footnote 4 above.

⁸ Section 81 of the Constitution establishes the procedure of appeal to the Judicial Committee. Paragraph 5 indicates that nothing in the section “shall affect any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter”.

7.4 With regard to the authors' claims under articles 25 and 26 of the Covenant, the Committee considered that in the light of the State party's Supreme Court decision of 10 November 2005 overruling its earlier decision in favour of the authors, of the constitutional provision about the division of the parliament seats according to affiliation to communities, and of the State party's Supreme Court view holding that only the legislative branch can amend the Constitution, the authors did not have further domestic remedies available. Accordingly, the Committee found that article 5, paragraph 2 (b), of the Optional Protocol did not preclude its examination of this part of the communication.

7.5 With regard to the State party's claim that the communication is incompatible with the provisions of the Covenant, the Committee recalled that the Optional Protocol provides for a procedure under which individuals can claim that their rights set out in part III of the Covenant, article 6 to 27 inclusive, have been violated. In the present communication, the authors allege violations of articles 25 and 26 of the Covenant. Insofar as the facts of the communication raise potential issues under these articles, the Committee considered the claims compatible *ratione materiae* with Covenant provisions and thus admissible.

7.6 The Committee further noted the State party's contention that the authors raised a hypothetical violation of articles 25 and 26 of the Covenant, as their rights were not infringed during the last general election and they were not candidates in any pending election. It also noted the authors' argument claiming that the Supreme Court decision of 10 November 2005, insisting on the requirement of community affiliation, would effectively bar them from running as candidates of forthcoming general elections. Considering the authors' effective participation in the parliamentary elections in 2005, the Committee noted that they had not substantiated any past violation of their rights protected under the Covenant. Nonetheless, considering the authors' refusal to include themselves in any of the community affiliations, the Committee concluded that in the light of the Supreme Court ruling of 10 November 2005, the authors were effectively precluded from participating in any future elections.⁹ It considered that the authors had sufficiently substantiated, for purposes of admissibility, their status as victims and their claims under articles 25 and 26 of the Covenant. It therefore declared the communication admissible insofar as it raised issues under articles 25 and 26 of the Covenant.

State party's observations on admissibility and merits

8.1 On 3 May 2010, the State party submitted its observations on the admissibility and the merits. In accordance with rule 99, paragraph 4, of the Committee's rules of procedures, the State party requested that the admissibility be reviewed on the basis of its previous submissions on admissibility.

8.2 On the merits, the State party submits that, pursuant to paragraph 3 (1) of the First Schedule to the Constitution, there is a legal obligation on a candidate for general elections to declare his community and that the candidate's declaration does not merely serve to determine his own eventual eligibility but it is required for the purposes of determining the "appropriate community" in order to allocate the additional eight seats among the unreturned candidates. The authors, by refusing to declare their community, are impeding the democratic process provided for under the Constitution and preventing the Electoral Supervisory Commission from performing its duty.

8.3 With regard to the concept of "way of life", the State party argues that constitutions are bound to be broad and that it is clear from paragraph 3 (4) of the First Schedule¹⁰ that

⁹ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1.

¹⁰ See footnote 1.

the General Population community was meant to be a residual category comprising those who are neither Hindu, Muslim or Sino-Mauritian. The State party submits that, in the circumstances that the mandatory nature of the declaration as to a candidate's community was to be understood as a restriction on a candidate's right to stand for elections, this restriction is justifiable based on objective and reasonable criteria¹¹ and is neither arbitrary nor discriminatory. Therefore, neither article 25 nor 26 of the Covenant are violated.

Authors' comments on the State party's observations

9.1 On 15 June 2010, the authors informed the Committee that general elections for the National Assembly were held on 5 May 2010. The authors' political party, Rezistans ek Alternativ, contracted an alliance, which was named Platform Pou Enn Nouvo Konstitisyon: Sitwayennte, Egalite ek Ekoloji (PNK). A total of 60 candidates of the PNK did not declare their community in accordance with the provisions of paragraph 3 (4) of the First Schedule of the Constitution and their nomination papers were declared invalid. According to the figures published by the Electoral Supervisory Commission, out of 545 candidatures, 104 were declared invalid for lack of community declaration.

9.2 On 21 April 2010, the authors and other candidates of the PNK, as well as other citizens whose candidatures had been declared invalid, filed an application to the Supreme Court requesting that their names be inserted into the lists of candidates for the general election. On 30 April 2010, the Supreme Court in its judgement *Dany Sylvie Marie and others v. The Electoral Commissioner and others* (SCR 104032) dismissed the application on the ground that it was bound by the decision of the Full Bench of the Supreme Court dated 10 November 2005 in the Narrain case. Nevertheless, the single judge held that section 1 of the Constitution is the most authoritative provision of the Constitution and therefore all provisions of the Constitution must comply with section 1, which includes the right to stand as a candidate. This right should have precedence over the right to the allocation of best-loser seats, which is a protection afforded to minorities in the First Schedule. The judge endorsed the reasoning of Judge Balancy in *Narrain and others v. The Electoral Commissioner and others* of 2005 (SCJ 159), that disqualifying an otherwise qualified person from standing as a candidate on the sole ground that he failed to declare his community imposed an unreasonable and unjustifiable restriction on his fundamental right.

9.3 Regarding the State party's observations on merits, the authors strongly object to the accusation that by refusing to declare their community they have deliberately impeded the democratic process and prevented the Electoral Supervisory Commission from performing its constitutional duty.

9.4 The authors comment on the State party's observation that the candidate's declaration as to community does not merely serve to determine the candidate's own eventual eligibility but is also required for the purposes of determining the "appropriate community" in order to allocate the eight additional seats among the unreturned candidates (Best Loser System). They claim that the provision of the eight additional seats has not always been fulfilled. In 1982, 1991 and 1995, only four out of the eight nominations could be made and in 2010, the mechanism could only fill seven seats.

9.5 The authors submit that they do not dispute the constitutional status of the Best Loser System and that the system was devised to provide a balanced communal or ethnic representation in Parliament. However, they dispute that the criterion of classification "way of life" has any objective significance and that the system rests on population figures of

¹¹ General comment No. 25, para. 15.

1972. Therefore, the authors submit that the system no longer fulfils its declared objective and is thus no longer vital to democracy.

9.6 With regard to the alleged violation of article 25 of the Covenant, the authors recall the Committee's general comment No. 25 and reiterate that their disqualification to stand as candidates because of their failure to comply with an ethnic-based classification is neither objective nor reasonable.

9.7 As regards the alleged violation of article 26, the authors contend that their refusal to participate in a supplemental election system of the nomination of eight members cannot democratically justify their exclusion from the main electoral process. As a result, the authors consider that they are being discriminated against because of their opinion, political or otherwise, in not classifying themselves under one of the four ethnic-based categories.

9.8 In view of the preceding comments, the authors find no justification in the State party's invitation that the Committee review its decision on admissibility.

The parties' further observations

10. On 11 October 2010, the State party submitted further observations and informed the Committee that the authors and other parties had, on 23 June 2010, applied to the Judicial Committee of the Privy Council for permission to appeal the Supreme Court judgment of 30 April 2010. This decision remains pending.

11. On 24 February 2011, the authors submitted further comments and confirmed that the authors and other candidates whose candidatures had been declared invalid applied to the Judicial Committee of the Privy Council for special leave to appeal against the Supreme Court decision *Dany Sylvie Marie and others v. The Electoral Commissioner and others* (SCR 104032). They submit that this matter is different from the communication submitted to the Committee, albeit dealing with the same substantial issue, i.e. the right of a Mauritian to stand as a candidate at general elections without having to submit to the requirement for communal classification. The matter is different inasmuch as the parties are different; the cause of action is different, the one before the Committee originates from the 2005 general elections, while the one pending before the Privy Council stems from the 2010 general elections; the communication before the Committee invokes violations of the Covenant, in particular article 25, which provisions are not expressly provided for under the Constitution and therefore not enforceable by national courts. The authors argue that a recurrence of a violation of the provisions of the Covenant during the general elections of 2010 while the authors' communication was still under consideration by the Committee cannot invalidate the procedure which results from the previous violation during the 2005 general elections, even though domestic remedies are available to dispute the recurring violation.

12. On 14 June 2011, the State party submitted further observations on the authors' comments of 24 February 2011. It states that its observations of 11 October 2010 were purely factual and that the authors' allegation that it acted in "bad faith" is unwarranted. The State party notes that the authors admit that the present communication before the Committee deals with the same substantial issue as the one before the Judicial Committee of the Privy Council, irrespective of the different rights alleged to be infringed before the Committee and the Judicial Committee of the Privy Council.

13. On 31 January 2012, the authors informed the Committee that the Judicial Committee of the Privy Council had delivered its judgment in the matter of *Dany Sylvie Marie and others v. The Electoral Commissioner and others*, on 20 December 2011. The Council held that procedurally it had no jurisdiction to determine the matter and therefore refused the application for special leave. In the light of this pronouncement the authors contend that an aggrieved citizen whose candidature is refused for want of the "community" declaration is at a loss as regards the availability of any effective domestic

legal remedy which will enable him or her to seek redress in an effective manner, inasmuch as: (a) any judge called upon in future to determine a complaint following the rejection of a candidature shall be bound by the decision of the Full Bench in *Electoral Supervisory Commission v. The Hon. Attorney General* 2005 (SCJ 252); (b) the Judicial Committee of the Privy Council has held that the decision of such a judge is not subject to any appeal.

Issues and proceedings before the Committee

Review of the decision on admissibility

14.1 The Committee takes note of the State party's request that, pursuant to article 99, paragraph 4, of its rules of procedure, it reconsider its admissibility decision of 6 October 2009 and find the communication inadmissible on the grounds that the authors have failed to exhaust domestic remedies, that the communication is incompatible with the provisions of the Covenant and that it constitutes an abuse of the right of submission. It further notes that the authors' and other parties' application to the Judicial Committee of the Privy Council remained pending at the time of the submission of its observations. It notes the authors' arguments claiming that the matter before the Judicial Committee of the Privy Council is different from their communication before the Committee, as the parties are different, the issue before the Committee originated from the 2005 general elections and not from the 2010 elections and the provisions of the Covenant are not enforceable by national courts. It also notes the State party's argument that despite the different rights invoked before the Committee and the Judicial Committee of the Privy Council, the cause of the violation appears to be the same, namely the requirement of communal classification. The Committee notes that the Supreme Court, in its decision of 30 April 2010, despite expressing some inclination to concur with the Supreme Court decision of 10 June 2005 in favor of the authors, rejected the authors' and other parties' application on the grounds that the court was bound to the conclusions of the Full Bench of the Supreme Court of 10 November 2005, which held that only the legislative branch can amend the Constitution.

14.2 The Committee further notes that in its judgement of 20 December 2011 the Judicial Committee of the Privy Council declared that it had no jurisdiction to determine the matter in the case of *Dany Sylvie Marie and others v. The Electoral Commissioner and others*. The Committee recalls its conclusion in its admissibility decision of 6 October 2009 and considers that the State party's observations or arguments do not lead to a reconsideration of the Committee's admissibility decision. Accordingly, the Committee reiterates that the communication is admissible, insofar as it raises issues under articles 25 and 26 of the Covenant, and proceeds to its examination on the merits.

Consideration of merits

15.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

15.2 The Committee notes the authors' claim that they are unable to categorize themselves into any one of the four communities: Hindu, Muslim, Sino-Mauritian or General Population because the criterion "way of life", which serves as the basis for the classification, is vague and not defined by law. It also notes that, given the authors' unawareness of the criterion "way of life" under the First Schedule to the Constitution, they are unable to decide in which community they should classify themselves. It notes that the authors consider the imposition of classification for prospective candidates to constitute an unreasonable restriction on them. The Committee further takes note of the State party's explanation that the rationale behind the complex election system is to guarantee the representation of all ethnic communities. It also notes the State party's argument that a

candidate may not voluntarily decline to make a declaration as to the community, since the candidate's declaration is required for the purposes of determining the "appropriate community" in order to allocate the additional eight seats among unreturned candidates.

15.3 The Committee observes that the right to stand for election is regulated in the Constitution and in the First Schedule to the Constitution, which contains provisions on the Best Loser System. It also notes that the First Schedule refers to the 1972 official census regarding the number of members in the four communities. It also notes the information provided by the State party to the effect that the system was originally devised with a view to providing a balanced communal or ethnic representation in Parliament.

15.4 With regard to the alleged violation of the authors' right to stand for election, the Committee recalls its jurisprudence and general comment, namely that any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.¹² Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.¹³ Therefore, the Committee has to determine whether the mandatory requirement to declare a candidate's community affiliation is based on objective, reasonable criteria, which are neither arbitrary nor discriminatory.

15.5 The Committee observes that in the absence of any classification, a candidate is effectively barred from standing for general elections. It notes the State party's argument that the category General Population is the residual category comprising those who neither are Hindus, Muslims or Sino-Mauritians. According to the First Schedule to the Constitution, the additional eight seats under the Best Loser System are allocated giving regard to the "appropriate community", with reliance on population figures of the 1972 census. However, the Committee notes that community affiliation has not been the subject of a census since 1972. The Committee therefore finds, taking into account the State party's failure to provide an adequate justification in this regard and without expressing a view as to the appropriate form of the State party's or any other electoral system, that the continued maintenance of the requirement of mandatory classification of a candidate for general elections without the corresponding updated figures of the community affiliation of the population in general would appear to be arbitrary and therefore violates article 25 (b) of the Covenant.

15.6 In the light of this conclusion, the Committee decides not to examine the communication under article 26 of the Covenant.

16. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of the authors under article 25 (b) of the Covenant.

17. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation in the form of reimbursement of any legal expenses incurred in the litigation of the case, to update the 1972 census with regard to community affiliation and to reconsider whether the community-based electoral system is still necessary. The State party is under an obligation to avoid similar violations in the future.

¹² See communications No. 500/1992, *Debreczeny v. Netherlands*, Views adopted on 3 April 1995; No. 44/1979, *Pietraroia v. Uruguay*, Views adopted on 27 March 1981; general comment No. 25, para. 4.

¹³ General comment No. 25, para. 15.

18. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**G. Communication No. 1753/2008, *Guezout et al. v. Algeria*
(Views adopted on 19 July 2012, 105th session)***

<i>Submitted by:</i>	Yamina Guezout and her two sons, Abderrahim and Bachir Rakik (represented by TRIAL – Swiss Association against Impunity)
<i>Alleged victims:</i>	Kamel Rakik (respectively the son and brother of the authors) and the authors themselves
<i>State party:</i>	Algeria
<i>Date of communication:</i>	22 November 2007 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16
<i>Article of the Optional Protocol:</i>	Article 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International
Covenant on Civil and Political Rights,

Meeting on 19 July 2012,

Having concluded its consideration of communication No. 1753/2008, submitted by
Yamina Guezout and her two sons, Abderrahim and Bachir Rakik, under the Optional
Protocol to the International Covenant on Civil and Political Rights,

* The following members of the Committee participated in the examination of the present
communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr.
Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald
L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar
Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not participate in
the consideration of this communication.

The text of an individual (concurring) opinion by Mr. Walter Kälin is attached to these views.

The text of an individual (dissenting) opinion by Mr. Michael O'Flaherty, Mr. Krister Thelin and Mr.
Rafael Rivas Posada is attached to these views.

The text of an individual (concurring) opinion by Mr. Fabián Omar Salvioli is attached to these views.

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, dated 22 November 2007, are Yamina Guezout, an Algerian citizen born on 23 September 1936, Abderrahim Rakik, a British citizen, and Bachir Rakik, an Algerian citizen born on 8 December 1959. They have submitted the communication on behalf of Kamel Rakik, son of Yamina Guezout and brother to Abderrahim and Bachir Rakik, born on 23 March 1963 in Hussein-Dey (Algiers). The authors maintain that their son and brother, Kamel Rakik, is the victim of violations by Algeria of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; and article 16 of the Covenant. They also consider themselves to be the victims of violations by the State party of article 2, paragraph 3, and article 7 of the Covenant. They are represented by TRIAL (the Swiss Association against Impunity).¹

1.2 On 12 March 2009, the Committee, acting through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the case separately.

The facts as submitted by the authors

2.1 On 6 May 1996, at 4.30 p.m., plain-clothes police officers arrived in a number of unmarked vehicles (make: Peugeot J5 and J9) at the home of Kamel Rakik, in Ouled Moussa, a small rural village in the commune of Reghaïa (Boumerdes *wilaya*). First, they surrounded the whole building and told the neighbours to go home. Kamel Rakik was, at that time, at home with his wife and her sister, who had come to visit them. The police burst into the apartment. Kamel Rakik then ran into one of the bedrooms. To force him to come out, the policemen fired shots, used Kamel Rakik's wife as a human shield and threatened to kill the family. They then broke down the door and shot at Kamel Rakik, wounding him in the hands and the abdomen. Kamel Rakik was taken away, as were his wife and sister-in-law, separately, to the Châteauneuf Police Training Centre, also known as the Châteauneuf Operational Headquarters, a notorious torture and secret detention centre, where they were interrogated.

2.2 After 5 days in detention, the two women were transferred to another cell, where they were reunited with Kamel Rakik. He told them that, although he was wounded, he had been subjected to torture as soon as he had arrived at the Châteauneuf Operational Headquarters, that he had lost consciousness a number of times and had woken up at the military hospital in Blida, to which he had been admitted under a false name. When he had regained consciousness, the torture had resumed and had included beatings, electric shocks and use of the "rag technique".

2.3 Kamel Rakik, who was unable to move or meet his basic needs, had been placed together with his wife and members of her family² in the same cell, with no toilet or sanitation facilities, and where they had to sleep on the bare concrete floor. Once they had all been placed in the same cell, however, their situation had improved, as Kamel Rakik and

¹ The Covenant and its Optional Protocol entered into force for Algeria on 12 September 1989.

² During the interrogation process, Kamel Rakik's wife and her sister encountered other members of their family in detention, all accused of belonging to "a family of terrorists".

the members of his family were no longer interrogated or tortured. After 35 days of incommunicado detention, Kamel Rakik's wife and sister-in-law were taken away in a van and dropped off in the street in one of Algiers' outer suburbs. A few moments before they were removed from the detention centre, one of their captors had suggested, in an ironic tone, that they should say goodbye to Kamel Rakik, whom the torturers were about to take into the adjoining room. Since that day, there has been no news of the latter, despite repeated efforts by his father, Tahar Rakik, to find him, starting on the day of his son's disappearance until the time of his own death on 5 February 2003.

2.4 Tahar Rakik made every possible effort to contact the authorities to find out what had happened to his son. In the days following Kamel Rakik's arrest, his father contacted the police of the Algiers and Bourmerdes *wilayas*, who simply denied that Kamel Rakik had ever been arrested, saying that he was not wanted by the police. Tahar Rakik then repeatedly called for the public prosecutor attached to the court in Boudouaou to intervene. One of his letters was eventually registered with the public prosecutor's office, on 8 December 1996, but was not followed up. On 24 June 1998, the prosecutor sent Tahar Rakik a letter dated 21 February 1998, in which he informed him that his son had been "arrested by members of the security services and taken to the Algiers police station". The prosecutor, however, refused to open an investigation, maintaining that Tahar Rakik's complaint was not "legal". Thereupon the victim's father approached a lawyer in order to lodge a formal complaint of abduction with the public prosecutor's office, in accordance with articles 292 ff. of the Algerian Criminal Code. This complaint was filed with the registrar of the Boudouaou court on 25 March 2000. The prosecutor, however, refused to pursue the case on the grounds that "it was unthinkable that a complaint could be filed against the police". In order to appeal against the prosecutor's decision, the victim's father asked for an order stating that the case had been closed. The prosecutor refused this request and warned the lawyer engaged by Tahar Rakik of the dire consequences he might face if he continued to pursue the case. In fact, the complaint lodged on 25 March 2000 was never followed up.

2.5 Tahar Rakik then contacted various national institutions, including the Ministry of Justice, the Ministry of the Interior, the President of the Republic and the Ombudsman. Only the latter responded and registered Tahar Rakik's request, although he indicated that, in view of the situation in the country and the scope of his mandate, as established by Presidential decree, he could only inform him that his case had been referred to the relevant institutions for consideration. On 19 October 1998, Kamel Rakik's case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances.

2.6 In the course of 2006, Yamina Guezout was instructed by the Algiers security services to take the administrative steps necessary to obtain compensation under the provisions of the Ordinance of 27 February on implementing legislation for the Charter for Peace and National Reconciliation.³ She rejected the advice, however, as she refused to apply for a death certificate for her son until she could be sure what had happened to him.

2.7 Despite all the efforts made by the victim's family, no investigation was ever opened by the State, and the family has received no news at all since of Kamel Rakik's fate. The authors are no longer entitled, moreover, to initiate judicial proceedings following the enactment of Ordinance No. 06-01 of 27 February 2006 on implementing legislation for the Charter for Peace and National Reconciliation. While domestic remedies were already futile and ineffective, they have now simply become unavailable.

³ As noted in paragraph 3.2 below, the authorities also told the victim's mother to take the necessary steps to obtain a death certificate.

The complaint

3.1 On 6 May 1996, Kamel Rakik was the victim of enforced disappearance, following his arrest by police officials; his arrest had been followed by a refusal to acknowledge deprivation of liberty and by concealment of his fate. The authors refer to article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, and to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

3.2 As more than 11 years have passed since his disappearance at a secret detention centre,⁴ there is very little hope of finding Kamel Rakik alive. All the facts point to the conclusion that he died in prison – not only his prolonged absence and the circumstances and context of his arrest, but also the fact that the law enforcement services have instructed his mother to initiate the procedure to obtain a death certificate. The authors contend that incommunicado detention entails a high risk of the violation of the right to life. The threat posed by enforced disappearance to the victim's life thus constitutes a violation of article 6, paragraph 1, to the extent that the State has failed in its duty to protect the fundamental right to life, all the more so since the State party has made no effort whatsoever to investigate the fate of Kamel Rakik. The authors therefore allege that the State party has violated article 6, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 Being subjected to an enforced disappearance in itself constitutes inhuman or degrading treatment. In addition, when making the arrest, the police officers used their firearms even though they had no reason to believe that the victim was armed. The injuries and suffering caused by this illegitimate and disproportionate use of force by the police constitute a serious violation of the rights guaranteed under article 7 of the Covenant. Kamel Rakik was also subjected to torture during his interrogation, a fact that he reported to his wife and her sister shortly before they saw him for the last time.

3.4 For the authors, Kamel Rakik's disappearance, was — and continues to be — a paralysing, painful and agonizing ordeal, in violation of article 7 of the Covenant.

3.5 Kamel Rakik was arrested by the police without a warrant and without being informed of the reasons for his arrest. During his interrogation he was at no point informed of the criminal charges against him. In addition he was not promptly brought before a judge or other judicial authority. Moreover, as a victim of enforced disappearance, he was physically unable to appeal against the legality of his detention or to apply to a judge to request his release. The authors note that it was not until 1998 that the prosecutor finally acknowledged that Kamel Rakik had indeed been arrested, but he still did not let them know where Kamel Rakik was being held or what had happened to him. These facts constitute violations of article 9, paragraphs 1, 2, 3 and 4, of the Covenant.

3.6 If it is assumed that Kamel Rakik was the victim of a violation of article 7, it cannot be argued that he was ever treated in a humane manner or with respect for the inherent dignity of the human person. Consequently, the authors maintain that the State party has also violated article 10, paragraph 1, of the Covenant.

3.7 As a victim of an unacknowledged detention, Kamel Rakik was also reduced to the status of a non-person, in violation of article 16 of the Covenant. In this respect, the authors note that enforced disappearance essentially entails the negation of the right to be recognized as a person before the law, insofar as the refusal of the authorities to reveal the

⁴ Or 16 years, at the time of consideration by the Committee of the case.

fate of the missing person or the place of detention, or even to admit that he has been deprived of his liberty, places that person outside the protection of the law.

3.8 As a victim of enforced disappearance, Kamel Rakik was de facto prevented from exercising his right to challenge the legality of his detention, as guaranteed under article 2, paragraph 3, of the Covenant. The authors, for their part, have used all legal avenues available to them to find out the truth about the fate of their son and brother, but the case was never pursued by the State party, despite its obligation to ensure an effective remedy, including the duty to carry out a thorough and diligent investigation into the case. The authors therefore contend that the State party has violated article 2, paragraph 3, with respect both to Kamel Rakik and to themselves.

3.9 The members of Kamel Rakik's family do not know for certain that he is deceased, and they continue to hope that he is still being held incommunicado. Their hope has been further strengthened by persistent reports that several secret detention centres still remain in Algeria, both in the south and in Oued Namous, where thousands of persons had already been placed in administrative detention between 1992 and 1995, and in the north of the country, in particular in the barracks and centres run by the Intelligence and Security Department. The authors therefore fear that, if the victim is still alive, the agents or services holding him could be tempted in the circumstances to make him disappear for good. Moreover, under article 46 of the Ordinance setting forth implementing legislation for the Charter for Peace and National Reconciliation, any person who files a legal complaint of abuses such as those to which Kamel Rakik was subjected is liable to receive a prison sentence. The authors therefore request that the Committee urge the Algerian Government to release Kamel Rakik if he is still being held incommunicado, to take all necessary steps to prevent him from suffering irreparable harm, and to refrain from applying the provisions of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 on implementing the Charter for Peace and National Reconciliation to the authors or any of the victim's relatives, from invoking the above-mentioned articles and from threatening them in any way with the aim of depriving them of their right to contact the Committee.

State party's observations on admissibility

4.1 On 3 March 2009, the State party, in a background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation, has contested the admissibility of the present communication and of 10 other communications submitted to the Human Rights Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of the public authorities, in cases of enforced disappearances during the period in question, that is, between 1993 and 1998, should be dealt with within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat a variety of uncoordinated groups, with the result that a number of confused operations were conducted among the civilian population, and it was not easy for the public to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Enforced disappearances were due to many causes, which cannot, however, according to the State party, be blamed on the Government. According to information documented by many independent sources, including the press and human rights organizations, generally speaking the disappearances that occurred in Algeria during the period in question corresponded to six distinct scenarios, none of which can be blamed on the Government. The first scenario cited by the State party concerns persons reported missing by their relatives who in fact had chosen to go underground in

order to join armed groups and had asked their families to declare that they had been arrested by the security services as a way of “covering their tracks” and avoiding “harassment” by the police. The second concerns persons who were reported missing after their arrest by the security services and who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups who, because the latter were not identified or were using uniforms or identification documents taken from police officers or soldiers, were mistaken for members of the armed forces or security services. The fourth scenario concerns persons who were reported missing, but who had actually abandoned their families and in some cases even left the country because of personal problems or family disputes. The fifth case concerns persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the bush following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the sixth scenario mentioned by the State party concerns persons reported missing who were in fact living in Algeria or abroad under false identities provided by a vast network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general notion of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, had decided to pursue a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared during the “national tragedy” would be cared for, all those victims would be offered support in overcoming their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances were reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned, added to a total of DA 1,320,824,683 in the form of monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple applications to political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the competent courts. The State party observes that it emerges from the authors’ statements⁵ that the complainants have written letters to political or administrative authorities, petitioned advisory or mediation bodies and lodged a complaint with representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and to refer a case to an investigating judge. In the Algerian legal system, it is the Public Prosecutor who receives complaints and who institutes criminal proceedings where necessary. However, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes proceedings by bringing a matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, has not been used in the event, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

⁵ As the State party has provided a common reply to 11 different communications, it refers to the “authors”. This reference also includes the authors of the present communication.

4.5 The State party also notes the authors' contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective, useful and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed they did not need to bring the matter before the relevant courts, in view of the latter's likely position and understanding regarding the application of the ordinance. However, the authors cannot invoke the ordinance and its implementing legislation as a reason for not instituting the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.⁶

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, whose implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who has been found guilty of acts of terrorism or to whom the legislation on civil dissent applies, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, such as the provision of employment placement assistance or compensation for all persons considered to be victims of the "national tragedy". Lastly, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and declares inadmissible any individual or collective proceedings against members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic.

4.7 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to undertake a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid situations of confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the authors' allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the sociopolitical and security context in which they occurred; to find that the authors failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and related covenants and

⁶ The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

conventions; to find the above-mentioned communications inadmissible; and to request the authors to seek alternative remedies.

Additional observations by the State party on admissibility

5.1 On 9 October 2009, the State party transmitted an additional memorandum to the Committee, in which it raises the question of whether the submission of the series of individual communications to the Committee might not rather be an abuse of procedure aimed at bringing before the Committee a broad historical issue whose causes and circumstances lie outside the scope of the Committee. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred and focus solely on the actions of the security forces, without ever mentioning those of all the armed groups that used criminal techniques of concealment in order to incriminate the armed forces.

5.2 The State party asserts that it will not address the merits of the aforementioned communications until the issue of their admissibility has been settled, arguing that all judicial or quasi-judicial bodies have the obligation to deal with preliminary questions before considering the merits. According to the State party, the decision in the present cases to insist on the consideration of questions of admissibility and the merits jointly and concomitantly — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions may be considered separately. With regard, in addition, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the indictments chamber, a high-level investigating court with jurisdiction to hear appeals.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party points out that mere doubts about the prospect of success or concerns about delays do not exempt the authors from the obligation to exhaust such remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure of the authors to take any steps to submit their allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence or security forces of the Republic” for actions consistent with their core republican duties, namely, to protect persons and property, to safeguard the Nation and to preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place outside of that framework are subject to investigation by the appropriate courts.

5.4 In a note verbale dated 6 October 2010, the State party reiterated the observations regarding admissibility which it had submitted to the Committee in a note verbale of 3 March 2009.

Authors’ comments on the State party’s observations

6.1 On 23 September 2011, the authors submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits.

6.2 The authors note that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate to refer any specific case before the Committee. That is for the Committee to decide when it examines the communication. Referring to article 27 of the Vienna Convention, the authors consider that the State party's adoption of domestic legislative and administrative measures to assist the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol.⁷ In theory, while such measures may well have an impact on the settlement of a dispute, they must be considered with regard to the merits of the case rather than its admissibility. In the case at hand, the legislative measures adopted themselves constitute a violation of the rights enshrined in the Covenant, as the Committee has previously observed.⁸

6.3 The authors recall that the Government's declaration of a state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Under article 4 of the Covenant, the declaration of a state of emergency may allow for derogations from only certain provisions of the Covenant but does not affect the exercise of rights under the Optional Protocol. The authors therefore consider that the State party's observations on the validity of the communication do not constitute a ground for inadmissibility.

6.4 The authors further refer to the State party's argument that the requirement to exhaust domestic remedies means that the authors must institute criminal proceedings by filing a complaint and suing for damages with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff.) of the Code of Criminal Procedure. They cite the Committee's recent jurisprudence in the *Daouia Benaziza* case, in which it stated in the Views adopted on 27 July 2010 that: "... the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor."⁹ The authors therefore consider that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. Nevertheless, no action was taken, even though several attempts were made by Kamel Rakik's family, starting from the date of his disappearance on 6 May 1996, to make enquiries with the police concerning his whereabouts, but to no avail.

6.5 When he learned that his son was arbitrarily being held in detention at the Châteauneuf Operational Headquarters, the victim's father contacted the public prosecutor

⁷ Article 27 of the Vienna Convention on the Law of Treaties states that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

⁸ The authors refer to the concluding observations of the Human Rights Committee concerning Algeria (CCPR/C/DZA/CO/3), 12 December 2007, paras. 7, 8 and 13. They also refer to communication No. 1588/2007, *Daouia Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The authors further refer to the concluding observations of the Committee against Torture concerning Algeria (CAT/C/DZA/CO/3), 26 May 2008, paras. 11, 13 and 17. Lastly, they refer to general comment No. 29 on derogations during a state of emergency, para. 1; *Official documents of the General Assembly, fifty-sixth session, Supplement No. 40, vol. I (A/56/40) (Vol. I), annex VI*.

⁹ Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, op. cit., para. 8.3.

attached to the court in Boudouaou and asked him to intervene and to place his son under the protection of the law. When the prosecutor failed to take any action, another letter was sent to him. That letter was filed in the registry of the office of the public prosecutor at the court in Boudouaou but did not result in any investigation. The family of the victim subsequently filed a number of complaints with this authority. In March 2000, the lawyer engaged by Kamel Rakik's father submitted an official complaint, alleging abduction, to the office of the general prosecutor. The prosecutor did not pursue this complaint and even refused to issue an order stating that the case had been closed, which would have opened the way to other legal remedies. Moreover, he also threatened the lawyer in question. In fact, the case was not pursued. The authors add that Kamel Rakik's family had also approached government institutions such as the Ministry of Justice, the Ministry of the Interior, the President of the Republic and the Ombudsman. The authorities are responsible for prosecuting such cases, and the authors should not therefore in the circumstances be criticized for not bringing criminal indemnification proceedings.

6.6 As to the State party's argument that mere "subjective belief ... or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the authors cite article 45 of Ordinance No. 06-01, whereby no legal proceedings may be brought against individuals or groups who are members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of between 3 and 5 years and a fine of between DA 250,000 and DA 500,000.¹⁰ The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate a complaint, as that would have involved violating article 45 of the ordinance, or how the authors of a complaint could have been guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, in the light of these provisions it may be concluded that any complaint regarding the violations suffered by the authors and Kamel Rakik would be not only declared inadmissible, but also treated as a criminal offence. The authors note that the State party fails to provide an example of any case which, despite the existence of the above-mentioned ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a case similar to the one under consideration. The authors conclude that the remedies mentioned by the State party are futile.

6.7 With respect to the merits of the communication, the authors note that the State party has merely enumerated a number of scenarios according to which victims of the "national tragedy" might have disappeared. Such general observations do not answer the allegations made in the present communication. Furthermore, the comments are enumerated identically in a series of other cases, which shows that the State party is still unwilling to consider such cases individually.

6.8 With regard to the State party's argument that it is entitled to ask for the admissibility of the communication to be considered separately from the merits, the authors refer to rule 97, paragraph 2, of the rules of procedure, which states that the "working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility". This means that it is neither for the authors of the communication nor for the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The authors consider that the present case is no different from other cases of enforced disappearance and that its admissibility should not be considered separately from the merits.

¹⁰ At the time of adoption of these Views, equivalent to a fine of between US\$ 3,136 and US\$ 6,272.

6.9 Lastly, the authors note that the State party has not refuted their allegations, which are corroborated and substantiated by numerous reports on the security forces' actions at the time and by the authors' own persistent efforts. In view of the State party's involvement in Kamel Rakik's disappearance, the authors are unable to provide any further evidence in support of their communication, since such evidence is entirely in the hands of the State party. The authors also point out that the lack of any submissions from the State party regarding the merits of the case is tantamount to the State party's acquiescence that the violations have indeed been committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Kamel Rakik was reported to the Working Group on Enforced or Involuntary Disappearances in 1998. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹¹ Accordingly, the Committee considers that the examination of Kamel Rakik's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes the State party's argument to the effect that the authors have not exhausted domestic remedies, on the ground that they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee notes further that, according to the State party, the authors wrote letters to political or administrative authorities, petitioned advisory or mediation bodies and lodged a complaint with representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee also notes the authors' argument that, when he learned that his son was arbitrarily being held in detention at the Châteauneuf Operational Headquarters, the victim's father contacted the public prosecutor attached to the court in Boudouaou and asked him to intervene and to place his son under the protection of the law; that in the absence of any action on the part of the prosecutor, another letter was sent to him; that this letter was filed in the registry of the office of the public prosecutor at the court in Boudouaou, but did not result in any investigation; that a number of complaints were subsequently filed with this authority by the victim's family; and that the office of the public prosecutor received an official complaint in March 2000 alleging abduction lodged by the lawyer engaged by the victim's father. The Committee notes the authors' statement

¹¹ See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

that the prosecutor did not pursue this complaint and even refused to issue an order stating that the case was closed, which would have opened the way to other legal remedies; and that the lawyer representing the victim's father was reportedly threatened if he pursued the case further. Lastly, the Committee notes that, according to the authors, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations into alleged violations of human rights brought to the attention of its authorities, such as enforced disappearances, violations of the right to life and torture, but also to bring those responsible for such violations to justice.¹² However, the victim's family repeatedly contacted the competent authorities concerning Kamel Rakik's disappearance, and the State party itself acknowledged that it had detained the victim in a letter dated 21 February 1998, in which the prosecutor informed Kamel Rakik's father that his son had been "arrested by members of the security services and taken to the Algiers police station". Despite these elements, the State party failed to conduct a thorough and effective investigation into the disappearance of the son and brother of the authors, despite the serious allegations of enforced disappearance. The State party has also failed to produce any convincing indication that an effective remedy is de facto available while Ordinance No. 06-01 of 27 February 2006 continues to be applicable notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.¹³ Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered to be a substitute for the charges that should be brought by the public prosecutor.¹⁴ Moreover, given the unclear wording of articles 45 and 46 of the ordinance and, in the absence of satisfactory information from the State party about their interpretation and their enforcement in practice, the author's fears regarding the possible consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee finds that the authors have sufficiently substantiated their allegations insofar as they raise issues with respect to article 6, paragraph 1; article 7; article 9; article 10; article 16; and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on its merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 As the Committee has emphasized in previous communications in which the State party has provided general, collective observations in response to the serious allegations made by the authors of those complaints, it is clear that the State party has been content to

¹² See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4; communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4; and general comment No. 31 (2004) on article 2 of the Covenant, on the nature of the general legal obligation imposed on States parties to the Covenant, para. 18, *Official documents of the General Assembly, fifty-ninth session, Supplement No. 40, vol. I (A/59/40) (Vol. I), annex III*.

¹³ Concluding observations of the Human Rights Committee concerning Algeria (CCPR/C/DZA/CO/3), 12 December 2007, paras. 7, 8 and 13.

¹⁴ Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, op. cit., para. 8.3; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 7.4; and communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 6.4.

maintain that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearance during the period in question, that is, between 1993 and 1998, must be considered in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee wishes to recall its concluding observations concerning Algeria of 1 November 2007,¹⁵ as well as its jurisprudence,¹⁶ according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

8.3 The Committee notes that the State party has not replied to the authors' allegations concerning the merits of the case and recalls its jurisprudence,¹⁷ according to which the burden of proof should not rest solely upon the authors of a communication, especially given that the authors and the State party do not always have the same degree of access to evidence and that often only the State party holds the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.¹⁸ In the absence of any explanation from the State party in this respect, all due weight must be given to the authors' allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the authors, their son and brother, Kamel Rakik, was arrested on 6 May 1996 and was last seen by his wife and her sister at the Police Training Centre in Châteauneuf 35 days after his arrest and that the prosecutor at the court in Boudouaou acknowledged that Mr. Rakik had been arrested by members of the security services and taken to the Algiers police station. Despite repeated requests from the family, the Algerian authorities have never provided information on Kamel Rakik's fate. The Committee notes that the State party has acknowledged its involvement in the victim's arrest but has been unable to explain what has happened to him since then. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, removes such persons from the protection of the law and places their lives at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Kamel Rakik's life. The Committee therefore concludes that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant.

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, in which it recommends that States parties should make provisions against incommunicado detention. It notes that, in the present case, Kamel Rakik was arrested on 6 May 1996 and that his whereabouts have been unknown since his wife and her sister last

¹⁵ CCPR/C/DZA/CO/3, para. 7 (a).

¹⁶ Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; communication No. 1588/2007, *Benaziza v. Algeria*, op. cit., para. 9.2; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.2; and communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.2.

¹⁷ See, inter alia, communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; and communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.3.

¹⁸ See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

saw him in detention, 35 days after his arrest. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with respect to Kamel Rakik.¹⁹

8.6 The Committee also takes note of the anguish and distress caused to the authors by Kamel Rakik's disappearance. It considers that the facts before it indicate that they are the victims of a violation of article 7 of the Covenant.²⁰

8.7 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Kamel Rakik was arrested on 6 May 1996 by plain-clothed police officers, without a warrant, and without being informed of the reasons for his arrest; that according to the victim's wife and her sister, Kamel Rakik was not informed of the criminal charges against him and was not brought before a judge or other judicial authority with whom he could challenge the legality of his detention; and that it was only in 1998 that the prosecutor finally acknowledged Kamel Rakik's arrest, but did not inform the authors of the victim's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Kamel Rakik.²¹

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Kamel Rakik's incommunicado detention and the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.²²

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may be deemed to constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.²³ In the present case, the Committee notes that the State party has not furnished adequate explanations concerning the authors' allegations that they have had no news of their son and brother. The Committee concludes that Kamel Rakik's enforced disappearance for the past 16 years has denied him the

¹⁹ Communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.5; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.5; communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

²⁰ See communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.6; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, op. cit., para. 7.5; and communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, op. cit., note 16, para. 6.11.

²¹ See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.7.

²² See general comment No. 21 [44] on article 10, para. 3; communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

²³ Communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.8; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.8; communication No. 1780/2008, *Mériem Zarzi v. Algeria*, op. cit., para. 7.9; communication No. 1588/2007, *Daouia Benaziza v. Algeria*, op. cit., para. 9.8; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The authors invoke article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights may have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing complaints of rights violations. It refers to its general comment No. 31 (80), which provides, *inter alia*, that a failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, the victim's family contacted the competent authorities several times regarding Kamel Rakik's disappearance, including judicial authorities such as the public prosecutor. However, all their efforts were in vain or even proved dissuasive, and the State party has failed to conduct a thorough and effective investigation into the disappearance of the authors' son and brother. Furthermore, the legal prohibition on undertaking judicial proceedings following the promulgation of Ordinance No. 06-01, which sets forth implementing legislation for the Charter for Peace and National Reconciliation, continues to deprive Kamel Rakik and the authors of access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.²⁴ The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant with respect to Kamel Rakik and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with respect to the authors.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; article 16; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant with respect to Kamel Rakik and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant, with respect to the authors.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy by, *inter alia*: (a) conducting a thorough and effective investigation into the disappearance of Kamel Rakik; (b) providing the authors with detailed information about the results of the investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Kamel Rakik is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the authors for the violations suffered and to Kamel Rakik, if he is still alive. Ordinance No. 06-01 notwithstanding, the State should further ensure that it does not hinder victims of crimes such as torture, extrajudicial killings and enforced disappearances from exercising their right to an effective remedy. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to

²⁴ CCPR/C/DZA/CO/3, para. 7.

give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual (concurring) opinion of Mr. Walter Kälin

In this case, the Committee came to the conclusion that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant, by placing his life in substantial and ongoing danger for which it is accountable (para. 8.4). I welcome this approach to addressing the issue of the right of life as raised by the authors of the communication, who still hope that Mr. Rakik is alive. Experience shows that the number of those among the victims of prolonged disappearances who die or are killed while held in secret detention is very high. Thus, already in 1981, the 24th International Conference of the Red Cross considered that enforced disappearances imply "violations of fundamental human rights such as the right to life ...".^a

The 1992 Declaration on the Protection of all Persons from Enforced Disappearance^b recognized that such disappearance "... constitutes a grave threat to the right to life". Taking into account the seriousness of the risk and the fact that it is an inherent part of a situation created by the State, it is accurate to qualify the prolonged exposure of disappeared individuals to such threat as a violation of the duty to protect the life of persons even in cases where the victim might still be alive.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

^a 24th International Conference of the Red Cross, Manila, 7–14 November 1981, res. II.

^b 1992 Declaration on the Protection of all Persons from Enforced Disappearance adopted by General Assembly resolution 47/133 of 18 December 1992, article 1 (2).

Individual (dissenting) opinion of Mr. Michael O’Flaherty, Mr. Krister Thelin and Mr. Rafael Rivas Posada

The majority has found a direct violation of article 6, paragraph 1. We respectfully disagree.

In the Committee’s long established jurisprudence in cases of enforced disappearances, violation of article 6, paragraph 1, has only been found when the victim has been assumed not to be alive.^a However, recently, what has been a minority opinion has been embraced by the majority expanding the interpretation to also include instances where the victims’ death has not been established.^b In the case before us, the majority holds that the mere risk or danger of loss of life, in the enforced disappearance setting, is enough for a finding of a direct violation of article 6, paragraph 1. This new course may have far-reaching consequences.

If the mere risk to loss of life, in specific circumstances for which the State would be responsible, is the new test for direct application of article 6, paragraph 1, it would suggest that also cases where capital punishment is an issue may be covered; victims, languishing on death row awaiting execution of their death sentence, are certainly in danger of losing their life. We note, while in no way endorsing the death penalty, that an extensive interpretation of article 6, in light of the majority’s jurisprudence, would certainly benefit the individual, but it would arguably blur the line of cases falling under article 6, paragraph 2, of the Covenant. Other cases, which could be difficult to reconcile with the new broad interpretation, are all those where the State is ultimately responsible for various social and economic conditions. Life-threatening circumstances abound in many places in the world. To apply article 6, paragraph 1, to those cases, and in essence try to regulate the quality of life, would bring our Covenant into an area, for which other international instruments are better suited.

For these reasons, we find that in the case before us the Committee should have found, in line with its earlier established jurisprudence, that there is a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

^a Communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982; communication No. 563/1993, *Bautista v. Colombia*, Views of 27 October 1995; communication No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996; and communication No. 612/1995, *Arhuaco v. Colombia*, Views of 29 July 1997.

^b Communication No. 1780/2008, *Aouabdia v. Algeria*, Views of 22 March 2011; communication No. 1781/2008, *Berzig v. Algeria*, Views of 31 October 2011, and communication No. 1905/2009, *Khirani v. Algeria*, Views of 26 March 2012.

Individual (concurring) opinion of Mr. Fabián Salvioli

1. I agree with the decision of the Human Rights Committee in the *Guezout v. Algeria* case, communication No. 1753/2008, concerning the human rights violations referred to in the Views, affecting Kamel Rakik, Yamina Guezout and her two sons, Abderrahim and Bachir Rakik (respectively the mother and brothers of Kamel Rakik).

2. However, for the reasons given below, I feel obliged to place on record my thoughts regarding three issues which are extremely important for the consideration of cases of enforced disappearance, such as this one, namely the violation of article 6 of the Covenant, the violation of article 2, paragraph 2, of the Covenant, and the reparation provided.

The violation of article 6 of the Covenant in the case in hand and in cases of enforced disappearance

3. The Committee's jurisprudence has gradually evolved. In the beginning, a State's international responsibility for a violation of the right to life in cases of enforced disappearance was recognized only in cases of proven or presumed death.^a This position — which was already untenable in view of the manner in which international human rights law had developed — was reasonable because it was among the first measures of an international body confronted with a new and complex phenomenon, namely enforced disappearances.

4. Later, the Committee decided to pursue a more logical reasoning, whereby a State cannot benefit from a legal decision that arises from a situation it has itself brought about. The Committee therefore decided to give further thought to the scope of the guarantee (or protection) obligation, even though, in the *Aouabdia v. Algeria* case, instead of interpreting this obligation in the light of article 6 of the Covenant, it unduly restricted its scope, and adopted a mistaken approach to violations of the right to life by limiting them to the mere fact that the State was providing no effective remedy (art. 2.3). This led me to adopt a partially dissenting opinion in the *Aouabdia v. Algeria* case, where I explained what in my view should be the scope of the guarantee of the right to life, in particular in cases of radical and complex human rights violations, such as enforced disappearance (a line of argument to which I would refer to save repeating it in the present instance^b).

5. Subsequently, in the *Chihoub v. Algeria* case, the Committee found a direct violation of article 6 of the Covenant arising from the enforced disappearance of two persons, a finding with which I naturally agreed. Even though the specific reasoning of the finding rested on the fact that certain elements of the case appeared to suggest that the victims were deceased,^c in the section concerning remedies the State was ordered to release the two persons immediately if they were still being detained incommunicado.^d The Committee was implicitly adopting a more advanced position concerning the right to guarantee (or protection), and I did not therefore feel the need to give a specific opinion on this point, although I had done so for other aspects of the Views.

6. It is only recently, in the present *Guezout* case, that to my mind the Committee has fully grasped the brutal phenomenon of enforced disappearances in the light of the

^a Communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982.

^b Communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011; individual partially dissenting opinion of Mr. Fabián Salvioli, paras. 2–9.

^c See, for example, communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

^d Communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 10.

obligation of guarantee referred to in article 6 of the Covenant. This is clearly stated in the Views that "... The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, removes such persons from the protection of the law and places their lives at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Kamel Rakik's life. The Committee therefore concludes that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant ...".^e

7. The Committee referred to the obligation to guarantee the right to life in the case of enforced disappearances, which is not necessarily applicable to other possibilities, which are not considered in this case. With enforced disappearances, it is not a question of events that give rise to a "simple risk or danger of loss of life" but of a deliberate and intentional wish on the part of the State radically to breach its human rights obligations, by acting unequivocally as a violator rather than a guarantor, depriving the person of all protection.

8. It should not be difficult, in cases of enforced disappearance, to establish whether or not the obligation to protect the right to life has been violated by the State party; what is difficult, on the other hand, is to establish that the right to protection would be covered simply by offering an effective remedy. If one supposes that a habeas corpus remedy is available for six months after a person has been the victim of an enforced disappearance and that the person can therefore be released alive, can it really be argued that the State has fulfilled its duty to protect the right to life of that person during the six months that it deprived the person of minimum guarantees, while freely enjoying a power of life or death over its detainees?

9. The Committee's current approach, which leads to the conclusion that there has been a direct violation of article 6 of the Covenant in cases of enforced disappearance because the State has failed in its duty of protection (or duty of guarantee), represents an advance which must be preserved in the future, takes due account of the human rights violation that arises with enforced disappearance, and covers the duty of guarantee in its most logical sense, without reducing it to the availability or application of a simple judicial remedy.

The violation of article 2.2 of the Covenant in the case in hand and in cases where standards incompatible with the Covenant have been adopted

10. In the case in hand, the Committee should also have concluded that the State was responsible for a violation of article 2, paragraph 2, of the International Covenant on Civil and Political Rights with respect to the victims.

11. Ever since I joined the Committee, I have maintained that, quite incomprehensibly, the Committee has restricted its own competence to find a violation of the Covenant in the absence of a specific legal claim. Whenever the facts disclosed by the parties clearly establish a violation, the Committee can and should — by virtue of the principle of *iura novit curiae* — document the violation in proper legal form. The legal basis for this position and the reasons why neither the States nor the complainant end up without a proper defence are given in the partially dissenting opinion that I drafted in the *Weeramansa v. Sri Lanka* case, to which I refer.^f

^e Communication No. 1753/2008, *Guezout v. Algeria*, Views adopted on 19 July 2012, para. 8.4.

^f Communication No. 1406/2005, *Weeramansa v. Sri Lanka*, Views adopted on 17 March 2008; individual partially dissenting opinion by Mr. Fabián Salvioli, paras. 3–5.

12. In the case in hand, both parties have referred extensively to the provisions of Ordinance No. 06-01, implementing the Charter for Peace and National Reconciliation. The author for her part considers that some of the provisions of this ordinance are incompatible with the Covenant (see paragraphs 2.7 and 3.9 of the Committee's Views), while the State, which also refers to Ordinance No. 06-01, implementing the Charter for Peace and National Reconciliation, arrives at the opposite conclusion. It considers that the ordinance is perfectly compatible with current international law (see in particular paragraphs 4.5 and 4.6 of the Committee's Views).

13. In other words, the parties have sufficiently expounded their diverging points of view before the Committee with regard to Ordinance No. 06-01's compatibility or incompatibility with the Covenant. It is then up to the Committee to resolve the issue in accordance with the law but without necessarily following the legal reasoning of the parties, which may be accepted in whole or in part or rejected by the Committee, in the light of its own line of legal reasoning.

14. In the individual opinions I expressed previously with regard to Algeria, I explained the reasons why the Committee should deal with the question of the incompatibility of Ordinance No. 06-01 with the Covenant in the light of article 2, paragraph 2, and I explained why the application of this ordinance to the victims constituted a violation of these provisions of the Covenant in the case under review.^g The situation is similar in the present case: the Committee is fully competent to give legal form to the facts before it, considering that the State on 27 February 2006 enacted Ordinance No. 06-01, barring any legal remedy to shed light on the most serious crimes, such as enforced disappearances, which in effect guarantees impunity for those responsible for serious human rights violations.

15. By enacting that ordinance, the State established a provision which ran contrary to its obligation under article 2, paragraph 2, of the Covenant, which in itself constitutes a violation that the Committee should have pointed out in its decision, in addition to the established violations. The authors and Mr. Kamel Rakik himself were the victims — *inter alia* — of that legislation; therefore finding a violation of article 2, paragraph 2, in the present case is neither an abstract nor a rhetorical issue: in the end, it must not be forgotten that violations arising from a State's international responsibility directly affect the reparation that the Committee must request in each of its Views.

Reparation in the present case

16. As far as reparation in cases like this one is concerned, the Committee has recently made some progress, by expressing its intention to consider the matter in depth and to spell out the obligation to ensure that similar violations do not reoccur: I gave a detailed appreciation of the progress achieved in my separate opinions concerning the *Djebrouni*, *Chihoub* and *Ouaghlissi* cases (all three against Algeria), while I expressed the need to progress still further in order to dispel any residual ambiguity:^h the Committee must take a clear stand against the maintenance of legislation that is *per se* incompatible with the

^g Communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion by Mr. Fabián Salvioli, paras. 5–10; communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012; individual (concurring) opinion by Mr. Fabián Salvioli, paras. 10 and 11.

^h Communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 11–16; communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 11–16; and communication No. 1905/2009, *Khirani v. Algeria*; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 10 and 11.

Covenant, since it does not meet current international standards with regard to reparation for human rights violations.

17. In the *Ouaghlissi v. Algeria* case, the Committee used the same wording: "... Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future."ⁱ

18. The obligation to respect the rights established in the Covenant applies to all the powers of a State party. In this as in the previous cases, apart from warning the State not to apply Ordinance No. 06-01 (which undoubtedly extends to both the judicial and the executive branch), the Committee should have notified the State quite clearly that it needed to amend Ordinance No. 06-01, by repealing the clauses which were per se incompatible with the Covenant; that would have been in line with the concluding observations the Committee transmitted to Algeria after considering its third periodic report, in which it stated that: "The State party should repeal any provision of Ordinance No. 06-01 enacting the Charter for Peace and National Reconciliation, in particular article 46, which infringes freedom of expression and the right of any person to have access, at the national and international levels, to an effective remedy against violations of human rights ...".^j

19. In individual communications concerning a State party, cross-references to concluding observations issued by the Committee concerning the same State party prove extremely useful, especially when it comes to adding practical substance to the guarantee of non-recurrence. In the case in hand, one of the most important reparation measures would entail amending the provision which is incompatible with the Covenant. In that respect in particular, that Committee has once again lost a good opportunity to specify the reparation that was expected and thus to help States meet their obligations under the Covenant and the Optional Protocol more effectively.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

ⁱ Communication No. 1905/2009, *Khirani v. Algeria*, para. 9.

^j See CCPR/C/DZA/CO/3 (ninety-first session); concluding observations concerning Algeria, para. 8.

**H. Communication No. 1779/2008, *Mezine v. Algeria*
(Views adopted on 25 October 2012, 106th session)***

<i>Submitted by:</i>	Aïssa Mezine (represented by TRIAL – Swiss Association against Impunity)
<i>Alleged victims:</i>	Bouzid Mezine (brother of the author) and the author himself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	31 March 2008 (date of initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16
<i>Article of the Optional Protocol:</i>	Article 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2012,

Having concluded its consideration of communication No. 1779/2008, submitted to the Human Rights Committee by Aïssa Mezine, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 31 March 2008, is Aïssa Mezine, an Algerian citizen born on 6 July 1960 in Kouba, *wilaya* of Algiers. The author maintains that

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual (dissenting) opinion by Mr. Krister Thelin is annexed to these Views.

his brother, Bouzid Mezine, of Algerian nationality, born in Kouba (Algiers) on 1 December 1963, is the victim of violations by Algeria of article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1), article 16 and article 17 (para. 1), of the Covenant. The author also considers himself to be the victim of violations by the State party of article 2 (para. 3), article 7 and article 17 (para. 1), of the Covenant. The author and his brother are represented by TRIAL (the Swiss Association against Impunity).

1.2 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the substance of the case separately.

The facts as submitted by the author

2.1 On 11 August 1996, between 1.30 and 2 a.m., a military detachment entered the Mezine family home in Algiers. They were accompanied by men wearing civilian clothes, who said they were members of the military security services. They arrested Bouzid Mezine in front of his family and neighbours. Approximately 20 agents carried out a search. At no point did they produce an arrest warrant or a search warrant. The father of the victim asked why his son was being arrested and where he would be taken. The soldiers replied that they would take the victim to the Cherarba barracks, but they set off in a different direction (towards Ben Aknoun).

2.2 Since that night, the victim has never returned. No member of his family has been able to see him or contact him, and the authorities have never given any information to the family of his whereabouts, despite the repeated requests made to the competent authorities. In October 1996, a fellow prisoner who had been released said that the missing person was at the Blida military prison. This information was confirmed by a member of the army, speaking in his personal capacity.

2.3 The victim's father waited 48 hours, the legal time limit for police custody. He then looked for his son in many barracks and police stations in the region. He also contacted the various courts of Algiers to find out whether the victim had been brought before a prosecutor. On several occasions, he wrote to both civil and military authorities, without receiving any reply. He contacted the President of the Observatory on Human Rights, the President of the Republic and the Minister of Justice, requesting that a search be undertaken for the missing person, information regarding his whereabouts and an explanation of the reasons for his arrest. The author also applied to the Ombudsman of the Republic with the same request. On 23 February 1997, the latter gave a reply but no information about the fate of the victim.

2.4 At the same time, the victim's father asked the public prosecutor of the Court of Hussein Dey, and his superior, the chief prosecutor of the Court of Algiers, to inform him of the charges held against his son and to investigate his abduction. On 21 March 1999, the investigating magistrate of the First Chamber of the Court of Hussein Dey dismissed the case on the grounds that at that date, there was no known accused. Subsequently, the prosecutor's office of the Court of Hussein Dey informed the family that, because the victim had been arrested by members of the army, only the prosecutor of the Blida military court was competent to investigate and, if necessary, to institute legal proceedings. On 2 August 1999, a complaint was lodged with this authority.

2.5 More than seven months after lodging this complaint, the victim's father informed the Civil Court of Hussein Dey that the eyewitnesses to the abduction had still not been summoned to make their statements. No investigation had been launched, even though two neighbours who were present on the night had given their version of the events in a statement, authenticated by the *wilaya* of Algiers on 12 February 1998. The victim's father also made a statement on 7 March 2000. These statements were not entered in the military

court's case file. In the absence of any effective investigation, no legal proceedings were initiated, either before the civil courts or before the military courts. The family received no information from any formal investigation into the fate of the victim.

2.6 The Prosecutor of the Court of Hussein Dey, who had discontinued criminal proceedings, submitted an application instituting proceedings before a civil judge, in order to register the victim as a missing person. On 28 February 2000, the victim's father was summoned to appear before a hearing of the same court that was held on 11 March 2000. He pointed out that while an investigation was being conducted by the military court, the civil court should not issue an opinion on his son's disappearance, and he therefore requested the court to defer judgement. The court granted the father's request to defer a decision.

2.7 On 19 October 1998, the family submitted the victim's case to the United Nations Working Group on Enforced or Involuntary Disappearances. Algeria failed to reply to the Working Group's requests for information.

2.8 The author is unable to initiate legal proceedings in view of the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation. While domestic remedies were useless and ineffective in the first place they had simply become unavailable.

The complaint

3.1 Bouzid Mezine was the victim of an enforced disappearance on 11 August 1996. The author refers to article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. As the victim of enforced disappearance, Bouzid Mezine himself was prevented from exercising his right of appeal to challenge the lawfulness of his detention. His family used all the legal means available to find out the truth regarding his fate, but they encountered no response.

3.2 As more than 15 years have passed since his disappearance at a secret detention centre,¹ there is very little hope of finding Bouzid Mezine alive. The author considers that incommunicado detention involves a high risk of violation of the right to life. The threat posed by enforced disappearance to the victim's life thus constitutes a violation of article 6, to the extent that the State has failed in its obligation to protect the fundamental right to life, all the more so since the State party has made no effort to investigate the fate of Bouzid Mezine. The author therefore alleges that the State party has violated article 6, read in conjunction with article 2, paragraph 3, of the Covenant.

3.3 As regards the victim, merely being subjected to an enforced disappearance constitutes inhuman or degrading treatment. The anguish and the suffering caused by indefinite detention without contact with the family or the outside world constitutes treatment in breach of article 7 of the Covenant. For the author, moreover, Bouzid Mezine's disappearance resulted in a paralysing, painful and agonizing ordeal, in violation of article 7 of the Covenant.

3.4 Bouzid Mezine was arrested by soldiers without a warrant, and without being informed of the reasons for his arrest. During his interrogation, he was not informed of the criminal charges against him. Furthermore, he was not promptly brought before a judge or other judicial authority, which should not take longer than a few days, while incommunicado detention can itself lead to a violation of article 9, paragraph 3. As a victim

¹ Or 16 years, at the time of consideration of the case by the Committee.

of enforced disappearance, Bouzid Mezine was not physically able to appeal against the legality of his detention, or to apply to a judge to obtain his release. These facts constitute violations of article 9, paragraphs 1 to 4, of the Covenant.

3.5 If it is assumed that Bouzid Mezine has been the victim of a violation of article 7, it cannot be argued that he was ever treated in a humane manner, or with respect for the inherent dignity of the human person. Consequently, the author maintains that the State party has also violated article 10, paragraph 1, of the Covenant.

3.6 As the victim of an unacknowledged detention, Bouzid Mezine was also reduced to the status of a non-person, in violation of article 16 of the Covenant. In this regard, the author notes that enforced disappearance essentially entails the negation of the right to legal personality, insofar as the refusal of the authorities to reveal the fate of the missing person or even to admit that he has been deprived of his liberty denies that person the protection of the law.

3.7 State officials searched the Mezine family home in the middle of the night at 2 a.m., without producing a warrant, and consequently in violation of article 17, of the Covenant, in the sense defined by the Committee in its general comment on article 16 (1988).²

3.8 As a victim of enforced disappearance, Bouzid Mezine was, de facto, prevented from exercising his right to challenge the legality of his detention, as guaranteed under article 2, paragraph 3, of the Covenant. As for the author and his family, they used all legal avenues available to discover the truth about the fate of the victim, but their efforts met with no response by the State party, despite the latter's obligation to ensure an effective remedy, including the obligation to carry out a thorough and effective investigation into the case. The author therefore maintains that the State party has violated article 2, paragraph 3, with respect to Bouzid Mezine and to himself.

3.9 Bouzid Mezine's family members do not know for certain whether he is still alive, and continue to hope that he may be held incommunicado somewhere. Their hope has been further strengthened by continuing reports that a number of secret detention centres remain in Algeria, both in the south and in Oued Namous, where thousands of persons had already been placed in administrative detention between 1992 and 1995, and in the north of the country, in particular in the barracks and centres belonging to the Intelligence and Security Department. The author therefore fears that, should the victim still be alive, the officials or services holding him could be tempted in the event to make him "disappear" for good. Moreover, under article 46 of the Ordinance enacting the Charter for Peace and National Reconciliation, prison sentences may be handed down against persons filing legal complaints against abuses such as those to which Bouzid Mezine was subjected. The author therefore requests that the Committee ask the Algerian Government to release Bouzid Mezine if he is still in incommunicado detention and to take all necessary measures to avoid irreparable harm to the victim, and also to refrain from applying the provisions of articles 45 and 46 of the Ordinance of 27 February 2006 enacting the Charter for Peace and National Reconciliation to the author or any of the victim's relatives, from invoking the above-mentioned articles and from threatening the author in any way with the aim of depriving him of his right to apply to the Committee.

State party's observations on the admissibility of the communication

4.1 On 3 March 2009, the State party, in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in

² *Official Records of the General Assembly, Forty-third Session, Supplement No. 40*, vol. I (A/43/40, annex V).

connection with the implementation of the Charter for Peace and National Reconciliation”, contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period, the Government had to fight against groups that were not coordinated among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. On the basis of data recorded by a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of “covering their tracks” and avoiding being “harassed” by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the “national tragedy” would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation

bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors'³ statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed he did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to him. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.⁴

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings

³ As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the author of the present communication.

⁴ The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on the admissibility of the communication

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that for none of the complaints or requests for information he submitted, the author used channels that would have allowed consideration of the case by the Algerian judicial authorities.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the author to submit his allegations to examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the

applicability of the Charter. Moreover, under the Ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 In a note verbale dated 6 October 2010, the State party reiterated its observations regarding admissibility, which had been submitted to the Committee in a note verbale of 3 March 2009.

Author’s comments on the State party’s submission

6.1 On 23 September 2011, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits.

6.2 The author points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention, the author considers that the State party’s adoption of domestic legislative and administrative measures to support the victims of the “national tragedy” cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. In theory, such measures may well have an impact on the settlement of a dispute, but they must be studied with regard to the merits of the case and not to its admissibility. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.⁵

6.3 The author recalls that Algeria’s declaration of the state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant only during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The author therefore considers that the State party’s observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.4 The author also refers to the State party’s argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff.) of the Code of Criminal Procedure. He refers to the Committee’s recent jurisprudence in the Benaziza case, in which it stated in its Views adopted on 27 July 2010 that “the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for

⁵ The author refers to the concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13. The author also refers to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2 and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author further refers to the concluding observations of the Committee against Torture, Algeria, CAT/C/DZA/CO/3, 26 May 2008, paras. 11, 13 and 17. Lastly, he refers to the Human Rights Committee’s general comment No. 29 on derogations during a state of emergency, para. 1 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40), annex VI).

damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.”⁶ The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though members of Bouzid Mezine’s family attempted, from the date of his arrest on 11 August 1996, to make enquiries with various army barracks, the police and prosecutors in the region concerning his whereabouts, but to no avail.

6.5 The victim’s father petitioned the prosecutor of the Court of Hussein Dey and the chief prosecutor of the Court of Algiers regarding his son’s case, asking them to take the necessary steps to ascertain the facts. Then, on the advice of the Hussein Dey prosecutor, he petitioned the military prosecutor of Blida, who failed to undertake a serious investigation into Bouzid Mezine’s disappearance. In the absence of any effective investigation, no legal action was ever taken. At the same time, Bouzid Mezine’s brother and father wrote to the national authorities, including the Ombudsman of the Republic, the President of the National Observatory for Human Rights, the President of the Republic and the Minister of Justice, none of whom provided any information regarding the victim. These actions did not lead to an effective investigation, or to the prosecution and conviction of those responsible for this enforced disappearance, or to redress for the family of the missing person. The authorities are responsible for prosecuting such cases, and the author should not therefore in the circumstances be blamed for not instigating legal proceedings.

6.6 As to the State party’s argument that mere “subjective belief or presumption” does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between DA 250,000 and DA 500,000. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the Ordinance, or how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the Ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and Bouzid Mezine would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

6.7 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which the victims of the “national tragedy” in general terms might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact similar comments have been put forward in a number of other cases, which shows the State party’s continuing unwillingness to consider such cases individually.

6.8 With regard to the State party’s argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure, which states that the “working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility”. Consequently, it is not for

⁶ Communication No. 1588/2007, *Benaziza v. Algeria*, supra, para. 8.3.

the author of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance, and that admissibility should not be considered separately from the merits.

6.9 Lastly, the author notes that the State party has not countered his allegations. These are corroborated and substantiated by numerous reports on the security forces' actions at the time, and by the author's own persistent efforts. In view of the State party's involvement in the disappearance of his brother, the author is unable to provide additional information in support of his communication, as that information is entirely in the hands of the State party. The author also notes that the lack of any submissions from the State party regarding the merits of the case is tantamount to the State party's acquiescence that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Bouzid Mezine was reported to the Working Group on Enforced or Involuntary Disappearances in 1998. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.⁷ Accordingly, the Committee considers that the examination of Bouzid Mezine's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since he did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee notes that, according to the State party, the author and his father wrote letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee notes the author's contention that Bouzid Mezine's father approached the prosecutor of the Court of Hussein Dey and the chief prosecutor of the Court of Algiers regarding his son's case, asking them to take the necessary steps to ascertain the facts. He then petitioned the military prosecutor of Blida. The author and his father also wrote to the national authorities. No information regarding the victim was provided and the actions described led neither to an effective investigation

⁷ See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2 and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

nor to the prosecution and conviction of those responsible. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.⁸ Although Bouzid Mezine's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is de facto available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant.⁹ Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.¹⁰ Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears regarding the possible consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee finds that the author has sufficiently substantiated his allegations insofar as they raise issues under article 6, paragraph 1; article 7; article 9; article 10; article 16 and article 2, paragraph 3, of the Covenant, and therefore proceeds to consider the communication on its merits.

Consideration of the merits of the case

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 As the Committee has emphasized in connection with previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of such complaints, it is clear that the State party has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance between 1993 and 1998, must be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee recalls its concluding observations concerning Algeria of 1 November 2007¹¹ as well as its jurisprudence¹² whereby the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the

⁸ See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, para. 7.4; and communication No. 1905/2009, *Ouaghliissi v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

⁹ Concluding observations of the Human Rights Committee, Algeria CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

¹⁰ Communication No. 1588/2007, *Benaziza v. Algeria*, para. 8.3; communication No. 1781/2008, *Berzig v. Algeria*, para. 7.4; and communication No. 1905/2009, *Ouaghliissi v. Algeria*, para. 6.4.

¹¹ CCPR/C/DZA/CO/3, para. 7 (a).

¹² Communication No. 1588/2007, *Benaziza v. Algeria*, para. 9.2, communication No. 1781/2008, *Berzig v. Algeria*, para. 8.2 and communication No. 1905/2009, *Ouaghliissi v. Algeria*, para. 7.2.

Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case, and recalls its jurisprudence¹³ according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party holds the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.¹⁴ In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his brother, Bouzid Mezine, was arrested by soldiers during the night of 11 August 1996, which was the last time he was seen by his family; that in October 1996, a fellow prisoner who had been released reported that the missing person was in Blida military prison and that this information was confirmed to the family by a member of the army speaking in his personal capacity. Although Bouzid Mezine's family still hopes to find him alive, the Committee notes the author's and his family's fear that he may be deceased in view of his prolonged disappearance. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Bouzid Mezine's life. Therefore the Committee concludes that the State party has failed in its duty to protect Bouzid Mezine's life, in violation of article 6, paragraph 1, of the Covenant.¹⁵

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7 (1992),¹⁶ which recommends that States parties should make provision to ban incommunicado detention. It notes in the current case that Bouzid Mezine was arrested on 11 August 1996, and that his whereabouts have not been known since. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with respect to Bouzid Mezine.¹⁷

¹³ See, inter alia, communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4 and communication No. 1781/2008, *Berzig v. Algeria*, para. 8.3.

¹⁴ See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

¹⁵ See, inter alia, communication No. 1753/2008, *Guezout et al. v. Algeria*, Views adopted on 19 July 2012, para. 8.4 and communication No. 1781/2008, *Berzig v. Algeria*, para. 8.4.

¹⁶ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.*

¹⁷ See, inter alia, communication No. 1905/2009, *Ouaghlissi v. Algeria*, para. 7.5 and communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

8.6 The Committee also takes note of the anguish and distress caused to the author by Bouzid Mezine's disappearance. It considers that the facts before it disclose a violation with respect to him of article 7 of the Covenant read alone and in conjunction with article 2, paragraph 3.¹⁸

8.7 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Bouzid Mezine was arrested on 11 August 1996 by uniformed soldiers, without a warrant, and without being informed of the reasons for his arrest (see para. 2.1); that Bouzid Mezine was not informed of the criminal charges against him and was not brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention; and that no official information was given to the author and his family regarding the victim's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Bouzid Mezine.¹⁹

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Bouzid Mezine's incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.²⁰

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3 of the Covenant) have been systematically impeded.²¹ In the present case, the Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that he has had no news of his brother. The Committee concludes that Bouzid Mezine's enforced disappearance 16 years ago denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 With regard to the alleged violation of article 17, the Committee notes that the State did not provide any justification or clarification as to the entrance of law enforcement officials into the Mezine family home in the middle of the night at 2 a.m. without producing a warrant. The Committee concludes that the entrance of law enforcement officials into the family home of Mr. Bouzid in such circumstances constitutes an arbitrary and unlawful interference with their privacy, family, and home, in violation of article 17 of the Covenant.

¹⁸ See communication No. 1905/2009, *Ouaghlissi v. Algeria*, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria* para. 8.6. and communication No. 1640/2007 *El Abani v. Libyan Arab Jamahiriya*, para. 7.5.

¹⁹ See, inter alia, communication No. 1905/2009, *Ouaghlissi v. Algeria*, para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, para. 8.7.

²⁰ See, inter alia, communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

²¹ Communication No. 1905/2009, *Ouaghlissi v. Algeria*, para. 7.9; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.9. and communication No. 1780/2008, *Zarzi v. Algeria*, para. 7.9.

8.11 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (80) (2004),²² whereby the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the current case, although the victim's family repeatedly contacted the competent authorities regarding Bouzid Mezine's disappearance, including judicial authorities such as the public prosecutor, all their efforts led to nothing, or even proved dissuasive, and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Bouzid Mezine, the author and his family of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.²³ The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with article 6 (para. 1); article 7; article 9; article 10 (para. 1), article 16 and article 17 of the Covenant with regard to Bouzid Mezine and of article 2 (para. 3), read in conjunction with article 7 and 17 of the Covenant, with respect to the author.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 17 of the Covenant with regard to Bouzid Mezine, and of article 7, read alone and in conjunction with article 2 (para. 3), of the Covenant, with respect to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Bouzid Mezine; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Bouzid Mezine is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Bouzid Mezine, if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give

²² *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40 (vol.I)), annex III.*

²³ CCPR/C/DZA/CO/3, para. 7.

effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**I. Communication No. 1784/2008, *Schumilin v. Belarus*
(Views adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	Vladimir Schumilin (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	17 March 2008 (initial submission)
<i>Subject matter:</i>	Sanctioning (fining) of an individual for having distributed leaflets in violation of the right to disseminate information without unreasonable restrictions
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to impart information; permissible restrictions
<i>Article of the Covenant:</i>	19, paras. 2 and 3
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 2012,

Having concluded its consideration of communication No. 1784/2008, submitted to the Human Rights Committee by Vladimir Schumilin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Vladimir Shumilin, a Belarusian national born in 1973. He claims to be a victim of violation by Belarus of his rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as submitted by the author

2.1 On 12 February 2008, the author distributed leaflets¹ containing information on the venue of a meeting in Gomel city with Mr. Milinkevich – a former candidate for the post of President of the Republic. The same day, he was apprehended by the police and a record concerning the commission of an administrative offence under article 23.24 (part 1) of the Code of Administrative Offences was established. The said article provides for the engagement of liability for violating the existing regulations on the organization and the conduct of meetings, street rallies, demonstrations, other mass events or pickets. These regulations are set by a specific law on mass events, whose article 8 forbids anyone to produce and disseminate information materials concerning events if the issue whether to authorize the event is still under consideration.

2.2 Given that the leaflets distributed by the author contained information concerning a meeting of a politician with citizens, the police considered that the author was doing this in breach of the law. The same day, the author was brought to the Court of the Soviet District in Gomel. The Court immediately issued a ruling that by distributing leaflets for a non-authorized meeting, the author had breached the provisions of article 23.24 (part 1) of the Code of Administrative Offences and fined him 1.05 million Belarusian roubles (equal at that time to US\$ 488). The author notes that the amount of the fine then exceeded the average monthly salary in Belarus.

2.3 The author points out that nothing in the administrative case file indicated that the court had based its conclusion on something other than the police record concerning him distributing leaflets. Therefore, the only question which had had to be examined by the court would have been to verify whether by distributing leaflets about an upcoming meeting amounted to a breach, by the author, of the regulations governing the organization of peaceful assembly. In his opinion, neither the police nor the court made an effort to clarify why the limitation of the author's right to disseminate information in this case was necessary for the purposes of article 19 of the Covenant.

2.4 On 29 February 2008, the Gomel Regional Court, on appeal, simply confirmed the Soviet District Court's decision, without providing a qualification of the author's acts in light of the Covenant's provisions, in spite of the explicit request of the author in this connection in his appeal claim. In particular, in his appeal, the author reminded the court that the provisions of international treaties in force for Belarus prevail in case of conflict with norms of domestic law, and that under the Vienna Law of the Treaties, national law cannot be invoked to justify non-application of provisions of international law; under article 15 of the State party's Law on international agreements, universally recognized principles of international law and the provisions of international agreements into force for Belarus are part of the domestic law. Article 19 of both the Universal Declaration of Human Rights and the Covenant prescribe the freedom to disseminate information.

¹ The author submits a copy of the leaflets in question. It contains a photograph of Mr. Milinkevich, and an explanation to the Gomel citizens that a month ago the City's Executive Committee was asked to authorize a public meeting with Mr. Milinkevich in the "Festivalny" Hall. It is explained that this request was supported by more than 300 Gomel's residents, and that the administration has later on refused to authorise the meeting under an "invented" pretext. The text continues with an explanation that the meeting with Mr. Milinkevich would take place anyway, on 15 February 2008, at 4 p.m. in an area between buildings located at Nr. 94-98 at Barykin Street, and at 5.30, at the Yanaki Kupaly Square. It is also explained that Mr. Milinkevich would expose his programme for overcoming the social-economic problems, which have occurred due to the "short-sighted" policy of the "current leadership", and he would also reply to questions. Finally, the leaflet contains a contact phone number for further explanations.

2.5 The author refers to the Committee's jurisprudence in similar cases, and emphasizes that the restriction of his right was not necessary for purposes of national security, public order, the defence of the morals and health of the population, or the freedoms of others.² He notes that the rights under article 19 are not absolute and may be restricted, but adds that the provisions of the State party's law on mass events restricting the right to disseminate information cannot be in conformity with the State party's obligations under the Covenant, as they are not aimed at protecting the State security or safety, the public order, or necessary for the protection of the health and morals of the population or for the protection of the rights and freedoms of others.

2.6 The author explains that he has exhausted available effective domestic remedies, without submitting appeals under the supervisory review proceedings which do not lead systematically to a review of a case and are thus not effective.

The complaint

3. The author claims that the application of the law on mass events in his case resulted in an unjustified limitation of his right to disseminate information under article 19, article 2, of the Covenant.

State party's observations on admissibility and merits

4.1 On 2 June and 4 August 2008, the State party provided its observations on the admissibility and the merits of the communication. It explained that, on 12 February 2008, the Court of the Soviet District of Gomel found the author guilty under article 23.34, part 1, of the Code of Administrative Offences and sentenced him to a fine. The court found out that, on 12 February 2008, the author together with another individual distributed leaflets calling for the citizens to attend an unauthorized meeting to take place on 15 February 2008. The police seized 1,933 leaflets in their possession. The State party explains that in court, Mr. Shumilin had accepted his guilt, and that he did not complain to a prosecutor about his administrative case. The court's decision was confirmed on appeal, on 29 February 2008, by the Gomel Regional Court. This decision entered into force immediately, and further appeals were only possible under the supervisory review proceedings.

4.2 The State party challenges the admissibility of the communication. It explains that under the provisions of the Procedural-Execution Code on Administrative Offences ("P.E. Code" hereafter), the author could have introduced a request for a supervisory review of the decision of the Gomel Regional Court with the President to the higher jurisdiction, the President of the Supreme Court in this case, but he failed to do so.

4.3 The State party explains that appeals under the supervisory review proceedings, as set up under article 12.14 of the P.E. Code, suppose a verification of the legality of the appealed decision, the grounds for decision and its fairness, in light of the arguments contained in the appeal. If the court reveals grounds for the improvement of the situation of the individual concerned, the previous decision may be re-examined in parts, even if the person had not requested this specifically in his/her appeal. Thus, according to the State party, the author's contention that supervisory proceedings are not effective is groundless. The State party adds that the author is still in a position to file a supervisory review appeal with the Supreme Court.

4.4 On the merits, the State party rejects the author's allegations in the present communication as groundless. It explains that under article 23.34 of the Code of

² The author refers in particular to case No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000.

Administrative Offences, violating the regulations on the organisation or carrying out of assemblies, meetings, demonstrations or mass events, constitutes an administrative offence and is subject to a warning or a fine. The material on file, including the leaflets in question, makes it clear that the planned meeting was not authorized. The leaflets contain a call to the citizens to attend the event. Given that no authorization for the said event has been received, the acts of the author could only be considered as constituting a breach of the regulation on the organization of mass events. The author breached article 8 of the law on mass events, pursuant to which prior to the receipt of an authorization to conduct a mass event, it is forbidden to anyone without exception to prepare and disseminate information materials.

Author's comments on the State party's observations

5.1 On 22 September 2008, the author explains that he has not complained to the prosecutor's office because his complaint would not lead to the re-examination of his case as such appeals are non-efficient and do not lead to the examination of the merits of the case. He notes that only effective and accessible remedies should be exhausted.

5.2 As to the State party's contention that he had distributed leaflets calling for a meeting prior to the obtaining of an authorization for the conduct of the event, the author notes that the Covenant is directly applicable in the State party and that it guarantees the freedom of everyone to freely disseminate all kinds of information. Even if this right is not absolute, its restrictions may only be done if justified for the purpose of the permissible limitations contained in article 19, paragraph 3, of the Covenant. Given that the restrictions of his rights were not justified under any of these permissible limitations, the authorities have breached his rights under article 19, paragraph 2, of the Covenant.

5.3 The author adds that pursuant to article 8 of the Constitution, the State party accepts the universally recognized principles of international law and ensures that national law complies with them. He notes that States parties must fulfil their international obligations in good faith, and points out that, according to articles 26 and 27 of the Vienna Law of the Treaties, a party to an international agreement cannot invoke its national law to justify non-execution of the international treaty. He also notes that under article 15 of the State party's law on international treaties, the universally recognized principles of international law and the provisions of the international treaties to which Belarus is a party constitute a part of the domestic law. Article 19, paragraph 2, of the Covenant guarantees the freedom of expression, including the right to disseminate information. This right can only be limited for the purposes listed in article 19, paragraph 3, of the Covenant. The grounds invoked by the courts when engaging his administrative liability in his case are not, according to the author, justifiable under any of the permissible limitations.

Additional observations by the State party

6.1 On 26 March 2009, the State party provided additional information. It noted, first, that the author is not correct when declaring that an appeal to the prosecutor's office does not lead to a re-examination of a case and that the supervisory appeal to the Supreme Court is not effective. In support, the State party provides statistical data, according to which in 2007, the Supreme Court examined appeals in 733 administrative cases, including at the request of the prosecutors' office. The Chairperson of the Supreme Court quashed or modified the decisions (rulings) in 116 cases (63 at the request of the prosecutor's office). In 2008, 171 such decisions were quashed or modified, 146 out of which were initiated by the prosecutor's office. A total of 1,071 administrative cases were examined by the Supreme Court in 2008. Thus, in 2007, the Supreme Court has quashed or modified decisions in administrative cases in 24.4 per cent of the cases appealed, and in 2008, this figure constitutes 29.6 per cent.

6.2 The State party next contends that the author's affirmation that the decision to have his administrative liability engaged was not justified under article 19, paragraph 3, of the Covenant, is groundless. The law on mass events regulates the organization and conduct of assemblies, meetings, demonstrations, street rallies, pickets, etc. Its preamble makes it clear that the aim of creating such a framework is to set up the conditions for the realization of the constitutional rights and freedoms of the citizens and the protection of the public safety and public order when such events are conducted on the streets, squares, or other public area. The author has breached the limitations under article 23.34 of the Code of Administrative Offences and article 8 of the Law on Mass Events, which are necessary for the protection of the public safety and order during the conduct of gatherings, meetings, street rallies, etc.

6.3 The State party adds that the right to freely express an opinion is guaranteed by article 19 to all citizens of the States parties to the Covenant. It explains that, as a party to the Covenant, it fully recognizes and complies with its obligations thereon. Article 33 of the Constitution guarantees the freedom of opinion and beliefs and their free expression. Even if the right to freedom of expression is considered as one of the main human rights, it is not absolute. Article 19 is not included in the list of articles, which cannot be derogated at any circumstances, contained in article 4 of the Covenant. Thus, the exercise of these rights can be restricted by the State, provided that the limitations are provided by law, have a legitimate aim, and are necessary in a democratic society.

6.4 Pursuant to article 23 of the Constitution, limitations of rights and freedoms are permitted only if they are provided by law and are in the interest of national security, public order, protection of morals and health of the population, and the rights and freedoms of others. Similarly, article 19, paragraph 3, of the Covenant provides that the rights set up in paragraph 2 of the same provision imply special obligations and particular responsibility. The exercise of these rights can therefore be limited, but the limitations must be provided by law and be necessary for the respect of the rights and reputation of others, the protection of the public order, health or morals.³

6.5 According to the State party, the above-mentioned permits it to conclude that the realization of the right to receive and disseminate information can be achieved exclusively in a lawful manner, i.e. in the framework of the existing legislation of a State party to the Covenant. The current Belarusian legislation offers the necessary conditions for the free expression of the opinion by the citizens, and for the receipt and dissemination of information.

6.6 The State party contends that the author induces the Committee into error concerning the existing legislation. Thus, pursuant to article 2.15, part 2, point 7, of the P.E. Code, a prosecutor, within his/her powers, can introduce a protest motion against court rulings on administrative cases which are contrary to the existing legislation. Article 2.15, point 1, of the same Code provides that court rulings on administrative cases which have entered into force can be re-examined, in particular following a protest motion introduced by a prosecutor. Article 12.14, point 2, of the Code provides that following the examination of the protest motion, the attacked ruling may be annulled partly or in its totality, and the case may be referred back for a new examination. Article 12.11, point 3, fixes a six months'

³ In this connection, the State party also notes that article 29 of the Universal Declaration of Human Rights provides that "(1) everyone has duties to the community in which alone the free and full development of his personality is possible" and that "(2) in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

timeframe for the introduction of protest motions, starting as of the date of the entry into force of the attacked rulings. Therefore, an appeal to the prosecutor's office may lead to a re-examination of the merits of an administrative case. In the present case, the author consciously has not availed himself of all domestic remedies of legal protection available to him.

Additional comments by the author

7.1 On 9 March 2011, the author reiterates that, according to him, supervisory review appeals do not constitute an effective remedy, due to the fact that their examination is left at the discretion of a single official, and if an appeal is granted, it would not lead to an examination of elements of facts and evidence. The author notes that the Committee has dealt with this issue on several occasions, and has concluded that it is not necessary to appeal under the supervisory review proceedings for purposes of article 5, paragraph 2 (b), of the Optional Protocol. The author also notes that the existing law does not allow individuals to file complaints to the Constitutional Court.

7.2 The author disagrees with the State party's rejection of his contention that his administrative case was not grounded under any of the permissible restrictions listed in paragraph 3 of article 19 of the Covenant, and he explains that the courts' decision in the case do not contain such argumentation. The judges in his case only referred to the national laws in their decisions, and ignored completely the State party's obligations under international law. With reference to the Committee's case-law,⁴ the author notes that the Committee has decided that giving a priority to the application of national law over the Covenant's provisions was incompatible with the State party's obligations under the Covenant. Pursuant to article 8, part 1, of the State party's Constitution, when they were examining his case, the courts were obliged to bear in mind the prevalence of the State party's international obligations over its national law's provisions.

7.3 The author reiterates that the Covenant's provisions prevail over national law and are part of it. He emphasizes that limitations of the right to disseminate information must be justified under article 19, paragraph 3, of the Covenant but this was not done in this case, and thus his right to freedom of expression was unduly restricted.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 As to the issue of exhaustion of domestic remedies, the Committee has noted the author's explanation that he has not sought to have the decision of the Court of the Soviet District of Gomel of 12 February 2008 or the decision, on appeal, of the Gomel Regional Court of 29 February 2008, examined under the supervisory review proceedings, as such a remedy is neither effective nor accessible. The Committee also notes the State party's objections in this respect, and in particular the statistical figures provided in support,

⁴ The author refers in particular to the Committee's Views in communication No. 628/1995, *Pak v. Republic of Korea*.

intending to demonstrate that supervisory review was effective in a number of instances. However, the State party has not shown whether and in how many cases supervisory review procedures were applied successfully in cases concerning freedom of expression. The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force do not constitute a remedy, which has to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.⁵ In light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, to examine the present communication.

8.4 The Committee considers that the author has sufficiently substantiated his claim of a violation of his rights under article 19, paragraph 2, of the Covenant. Accordingly, it declares the communication admissible, and proceeds with its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the author's fine for having distributed leaflets concerning two meetings of the Gomel population with a political opponent, for which authorization had not been given, has violated his rights under article 19, paragraph 2, of the Covenant.

9.3 The Committee recalls in this respect its general comment No. 34, in which it stated *inter alia* that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society. Any restrictions to freedom of expression must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".

9.4 The Committee has noted the State party's explanation that under its law on mass events, no information concerning possible meetings can be disseminated before the official authorization of the said meeting by the competent authorities and that the author's action constituted an administrative offence. The State party has also acknowledged that the right to freedom of expression may only be limited in line with the requirements set up in article 19, paragraph 3, of the Covenant, without explaining, however, how, in practice, in this particular case, the author's actions affected the respect of the rights or reputations of others, or posed a threat to the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls that it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party may introduce a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant. In light of the refusal of the Gomel Regional Court to examine the issue on whether the restriction of the author's right to impart information was necessary, and in the absence of any other pertinent information on file to justify its authorities' decisions under article 19, paragraph 3, the Committee considers that the limitations of the author's rights in the present case were incompatible with the requirements of this provision of the Covenant.

⁵ See, for example, communication No. 1814/2008, *P.L. v. Belarus*, Inadmissibility decision of 26 July 2011, para. 6.2.

It therefore concludes that the author is a victim of a violation by the State party of his rights under article 19, paragraph 2, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 19, paragraph 2, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the reimbursement of the present value of the fine and any legal costs incurred by the author as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Law on Mass Events, and its application, to ensure its conformity with the requirements of article 19, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**J. Communication No. 1785/2008, *Olechkevitch v. Belarus*
(Views adopted on 18 March 2013, 107th session)***

<i>Submitted by:</i>	Andrei Olechkevitch (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	17 March 2008 (initial submission)
<i>Subject matter:</i>	Fining of an individual for distributing leaflets, in violation of the right to impart information without unreasonable restrictions
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to impart information; permissible restrictions
<i>Article of the Covenant:</i>	Article 19 (paras. 2 and 3)
<i>Article of the Optional Protocol:</i>	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2013,

Having concluded its consideration of communication No. 1785/2008, submitted to the Human Rights Committee by Mr. Andrei Olechkevitch under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Andrei Olechkevitch, a Belarusian national born in 1974. He claims to be the victim of a violation by Belarus of his rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented by counsel.

* The following members of the Committee took part in the consideration of this communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kalin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of a separate opinion signed by Committee members Mr. Fabián Omar Salvioli, Mr. Yuval Shany and Mr. Víctor Manuel Rodríguez Rescia is appended to the present document.

The facts as submitted by the author

2.1 On 12 February 2008, when the author was distributing leaflets inviting residents of the city of Gomel to a meeting with Mr. Alexander Milinkevich, a former presidential candidate, he was arrested by the police and taken to the Gomel District Police Station,¹ where he was booked for an administrative offence under article 23.24 (part 1) of the Code of Administrative Offences (21 April 2006). The article prescribes penalties for violations of the regulations governing the organization and conduct of meetings, street rallies, demonstrations, other public events and pickets. These regulations are contained in the Public Events Act of 30 December 1997, article 8 of which prohibits the production and dissemination of information documents on such events before authorization to hold the event in question has been granted.

2.2 Given that the leaflets distributed by the author contained information on a public meeting with a politician, the police considered that the author was acting in breach of the law. That same day, the author was brought before the Gomel District Court. The Court ruled that, in distributing the leaflets, the author had breached the provisions of article 23.24 (part 1) of the Code of Administrative Offences concerning unauthorized meetings and fined him 1,050,000 Belarusian roubles (equivalent to approximately 500 US dollars at the time). The author notes that the amount of the fine exceeded the average monthly salary in Belarus.

2.3 The author points out that there is nothing in the administrative case file to indicate that the Court based its conclusion on anything other than the police record concerning his distribution of leaflets. Therefore, the only issue for the Court to examine was whether the distribution of leaflets about an upcoming meeting amounted to a breach by the author of the regulations governing the organization of a peaceful assembly. In his opinion, neither the police nor the Court made any effort to clarify, for the purposes of article 19 of the Covenant, why it was necessary in this case to restrict the author's right to impart information.

2.4 On 29 February 2008, the Gomel Regional Court, on appeal, upheld the District Court's decision without examining the author's acts in light of the Covenant, despite the author's explicit request to that effect in his appeal. In particular, in his appeal the author reminded the Court that the provisions of international treaties in force for Belarus prevailed in cases of conflict with the norms of national law; that, under the 1969 Vienna Convention on the Law of Treaties, national law could not be invoked to justify the non-application of provisions of international law; and that, under article 15 of the State party's law on international treaties, universally recognized principles of international law and the provisions of international agreements in force for Belarus were an integral part of national law. The author also noted that article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant enshrined the freedom to impart information.

¹ The author has provided a copy of the leaflet in question. It includes a photograph of Mr. Milinkevich and a message to Gomel residents explaining that a month earlier a request had been submitted to the Municipal Executive Committee for permission to organize a public meeting with Mr. Milinkevich at a local conference centre. According to the leaflet, the request was supported by more than 300 city residents but the municipal government refused permission under a "false" pretext. The leaflet explained that the meeting with Mr. Milinkevich would nevertheless take place on 15 February 2008, at 4 p.m. in the area between 94 and 98 Barykin Street and at 5.30 p.m. in Yanaki Kupaly Square. Mr. Milinkevich would present his proposed programme for tackling the social and economic problems created by the "short-sighted" policy of "current leaders" and would answer questions. The leaflet included a telephone number to call for further information. The incidents referred to in this communication are similar to those described in communication No. 1784/2008, *Schumilin v. Belarus*, Views of 23 July 2012.

2.5 The author refers to the Committee's jurisprudence in similar cases and emphasizes that the restriction of his right to impart information was not necessary for the protection of national security, public order, public health or morals, or the rights and freedoms of others. He notes that the rights guaranteed under article 19 are not absolute and may be restricted, but adds that the provisions of the State party's Public Events Act that restrict the right to impart information cannot be considered to conform to the State party's obligations under the Covenant, as they are not aimed at protecting national security or public safety or public order, and are not necessary to protect public health or morals or the rights and freedoms of others.

2.6 The author claims that he has exhausted available effective domestic remedies without submitting an appeal to the Supreme Court under the "supervisory review procedure" (*nadzor*), as this does not systematically lead to a re-examination of a case and is thus not effective.

The complaint

3. The author claims that the application of the Public Events Act in his case resulted in an unjustified restriction of his right to impart information under article 19, paragraph 2, of the Covenant.

State party's observations on the admissibility and the merits

4.1 On 2 June and 4 August 2008, the State party provided its observations on the admissibility and the merits of the communication. It explains that on 12 February 2008 the Gomel District Court found the author guilty under article 23.34 (part 1) of the Code of Administrative Offences and fined him. The Court determined that on 12 February 2008 the author and another individual had distributed leaflets inviting city residents to attend an unauthorized meeting on 15 February 2008. The police had seized 1,933 leaflets found in the two individuals' possession. The State party explains that Mr. Olechkevitch admitted his guilt in court and did not file an appeal with the procurator concerning the Court's decision. The Court's decision was upheld on appeal, on 29 February 2008, by the Gomel Regional Court. This decision became enforceable immediately, and further appeals were possible only under the supervisory review procedure.

4.2 The State party challenges the admissibility of the communication. It explains that under the Code of Administrative Procedure and Enforcement the author could have requested a supervisory review of the decision of the Gomel Regional Court by the president of the higher jurisdiction — in this case the President of the Supreme Court — but did not do so.

4.3 The State party explains that appeals under the supervisory review procedure, as outlined in article 12.14 of the Code of Administrative Procedure and Enforcement, involve verification of the legality of the decision being appealed, the grounds for the decision and its fairness in light of the arguments set out in the appeal. If the court finds grounds for improving the situation of the individual concerned, the previous decision may be re-examined in part, even if the person has not specifically requested this in the appeal. Thus, according to the State party, the author's contention that the supervisory review procedure is not effective is groundless.

4.4 On the merits, the State party rejects the author's allegations as groundless. It explains that, under article 23.34 of the Code of Administrative Offences, violating the regulations governing the organization and conduct of rallies, meetings, demonstrations or other public events constitutes an administrative offence punishable by a warning, a fine or administrative detention. The material on file, including the leaflets in question, makes it clear that the planned meeting was not authorized. The leaflets contained a call to city

residents to attend the meeting. Given that no authorization had been given to hold the event, the author's acts could only be considered as constituting a breach of the regulations on the organization of public events. The author violated article 8 of the Public Events Act, under which it is forbidden for anyone, without exception, to prepare and disseminate materials containing information about a public event until authorization to organize the event has been granted.

Author's comments on the State party's submission

5.1 On 17 September 2008, the author submitted his comments on the State party's submission. He explains that he did not file a complaint with the procurator's office because his complaint would not have led to the re-examination of his case, as such appeals are not effective and do not lead to the re-examination of the case. He notes that only effective and accessible remedies must be exhausted.

5.2 As to the State party's contention that he distributed leaflets inviting residents to attend a meeting before authorization to hold the event had been obtained, the author notes that, pursuant to article 8 of the Constitution, the State party accepts the universally recognized principles of international law and ensures that national law complies with them. He stresses that States parties must fulfil their international obligations in good faith, and points out that, under articles 26 and 27 of the Vienna Convention on the Law of Treaties, a party to an international agreement cannot invoke its national law to justify non-application of a treaty. He also notes that, under article 15 of the State party's law on international treaties, the universally recognized principles of international law and the provisions of the international treaties to which Belarus is a party constitute an integral part of national law.

5.3 Article 19, paragraph 2, of the Covenant guarantees freedom of expression, including the right to impart information. This right can only be restricted for the purposes listed in article 19, paragraph 3, of the Covenant. The grounds invoked by the courts to justify the administrative penalties imposed on him are not, according to the author, justifiable under any of the permissible restrictions, and thus his rights under article 19, paragraph 2, of the Covenant, have been violated.

Additional observations by the State party

6.1 In a note verbale dated 26 March 2009, the State party provided additional information. It notes, first, that the author is not correct in declaring that an appeal to the procurator's office does not lead to a re-examination of a case and that appeals to the Supreme Court under the supervisory review procedure are not effective. In support of its assertion, the State party provides statistical data indicating that in 2007 the Supreme Court examined appeals in 733 administrative cases, including those examined at the request of the procurator's office. The President of the Supreme Court quashed or modified the rulings in 116 cases (63 at the request of the procurator's office). In 2008, 171 such decisions were quashed or modified, of which 146 were re-examined at the request of the procurator's office. A total of 1,071 administrative cases were examined by the Supreme Court in 2008. Thus, in 2007, the Supreme Court quashed or modified decisions in 24.4 per cent of administrative cases appealed, and in 2008 the corresponding percentage was 29.6 per cent.

6.2 The State party next contends that the author's claim that the penalties imposed on him were not justified under article 19, paragraph 3, of the Covenant is groundless. The Public Events Act governs the organization and conduct of gatherings, meetings, demonstrations, street rallies, pickets, etc. Its preamble makes it clear that the aim is to establish the necessary conditions for the exercise by citizens of their constitutional rights and freedoms and the protection of public safety and public order during the conduct of such events on streets, in squares or in other public areas. The author violated the

restrictions enumerated in article 23.34 of the Code of Administrative Offences and article 8 of the Public Events Act, which are necessary for the protection of public safety and public order during the conduct of gatherings, meetings, street rallies, etc.

6.3 The State party adds that article 19 of the Covenant guarantees to all citizens of States parties to the Covenant the right to freely express their opinion. As a party to the Covenant, it fully recognizes and complies with its obligations thereunder. Article 33 of the Constitution guarantees freedom of opinion and beliefs and their free expression. Even if the right to freedom of expression is considered to be one of the core human rights, it is not absolute. Article 19 is not included in the list of articles in article 4 of the Covenant from which no derogation may be made. Thus, the exercise of this right may be restricted by the State, provided that the restrictions are provided for by law, have a legitimate aim and are necessary in a democratic society.

6.4 Pursuant to article 23 of the Constitution, restrictions of rights and freedoms are permitted only if they are provided for by law and are in the interest of national security, public order, or the protection of public morals or health or the rights and freedoms of others. Similarly, article 19, paragraph 3, of the Covenant provides that the rights enumerated in paragraph 2 of that article imply special obligations and responsibilities. The exercise of these rights can therefore be restricted, but the restrictions must be provided for by law and must be necessary for respect of the rights or reputations of others, or for the protection of public order, health or morals.

6.5 According to the State party, on the basis of the above-mentioned legal provisions, it can be concluded that the right to receive and impart information can be exercised only in a lawful manner, namely, in the framework of the existing legislation of a State party to the Covenant. Current Belarusian legislation provides the necessary conditions for the exercise of freedom of expression by citizens, and for the receipt and dissemination of information.

6.6 The State party contends that the author is misleading the Committee concerning the existing legislation. Pursuant to article 2.15 (part 2, point 7) of the Code of Administrative Procedure and Enforcement, procurators can, within the scope of their powers, introduce protest motions against court decisions on administrative cases that contradict existing legislation. Article 12.11 (point 1) of the Code provides that court decisions in administrative cases that have acquired the force of *res judicata* can be re-examined, notably following a protest motion introduced by a procurator. Under article 12.14 (point 2) of the Code, once the protest motion has been examined, the decision may be partly or totally revoked, and the case may be referred back for review. Article 12.11 (point 3) of the Code specifies a six-month time frame for filing a protest motion, starting from the date when the disputed decision becomes enforceable. Therefore, an appeal to the procurator's office may lead to a re-examination of the merits of an administrative case. In the present case, the author has knowingly refused to avail himself of all domestic remedies available to him.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

7.3 As to the issue of exhaustion of domestic remedies, the Committee has noted the author's explanation that he did not seek to have the decision of the Gomel District Court of 12 February 2008 or the decision, on appeal, of the Gomel Regional Court of 29 February 2008 examined under the supervisory review procedure, as in his view such a remedy is neither effective nor accessible. The Committee also notes the State party's objections in this respect, and in particular the statistics provided to demonstrate that supervisory review was effective in a number of instances. However, the Committee notes that the State party has not indicated whether the procedure has been successfully applied in cases concerning freedom of expression and has not specified the number of such cases, if any. The Committee recalls its jurisprudence, according to which procedures for the review of court decisions that have taken effect does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.² In light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication.

7.4 The Committee considers that the author has sufficiently substantiated his claim of a violation of his rights under article 19, paragraph 2, of the Covenant. Accordingly, it declares the communication admissible, and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered this communication in light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The issue before the Committee is whether the fine imposed on the author for distributing leaflets about the holding in Gomel of two unauthorized public meetings with a representative of the political opposition constitutes a violation of his rights under article 19, paragraph 2, of the Covenant.

8.3 In this connection the Committee recalls its general comment No. 34, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society. All restrictions imposed on freedom of expression must conform to the strict tests of necessity and proportionality, "must be applied only for those purposes for which they were prescribed" and "must be directly related to the specific need on which they are predicated".

8.4 The Committee has noted the State party's explanation that, under its Public Events Act, no information concerning a planned meeting can be disseminated before the meeting has been officially authorized by the competent authorities, and that the author's action constituted an administrative offence. The State party has also acknowledged that the right to freedom of expression may be restricted only in line with the requirements established in article 19, paragraph 3, of the Covenant, without, however, explaining how, in this particular case, the author's actions affected the respect of the rights or reputations of others, or posed a threat to national security, public order, or public health or morals.

8.5 The Committee recalls that it is up to the State party to demonstrate that the restrictions imposed on the right guaranteed by article 19 were necessary in the case in question,³ and that even if a State party is in a position to implement a system designed to

² See, inter alia, communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L. v. Belarus*, decision on inadmissibility of 26 July 2011, para. 6.2.

³ See, for example, communication No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3.

achieve a balance between individuals' freedom to impart information and the general interest in preserving public order in a particular area, this system's functioning must be compatible with article 19 of the Covenant. As the Gomel Regional Court refused to examine the issue of whether restricting the author's right to impart information was necessary, and in the absence of any other pertinent information on file to justify the authorities' decisions in light of article 19, paragraph 3, the Committee considers that in the present case the restrictions imposed on the author's rights were incompatible with the State party's obligations under this provision of the Covenant. It therefore concludes that the author is the victim of a violation by the State party of his rights under article 19, paragraph 2, of the Covenant.

9. In light of the above, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 19, paragraph 2, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of the reimbursement of the present value of the fine and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to prevent similar violations in the future. To this end, the State party should review its legislation, particularly the Public Events Act, and its implementation, to ensure it is compatible with article 19 of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Separate opinion of Committee members Mr. Fabián Salvioli, Mr. Yuval Shany and Mr. Víctor Rodríguez Rescia (concurring)

1. We concur with the decision of the Human Rights Committee in the case of *Olechkevitch v. Belarus* (communication No. 1785/2008) concerning the violation of article 19 of the Covenant by the imposition on the author of the penalty prescribed in article 8 of the Public Events Act in the Republic of Belarus. The latter stipulates that no one has the right to announce in the mass media the date, place and time of a public event, or to prepare and distribute leaflets, posters and other materials for this purpose, before permission to hold the event has been granted.

2. However, for the reasons set out below, we consider that the Committee should have concluded that in the case at hand the State party has also committed a violation of article 2, paragraph 2, of the International Covenant on Civil and Political Rights; moreover, given the facts as established, the Committee should have considered the violation of article 19 in the light of article 21 of the Covenant.

3. The Committee has incomprehensibly restricted its own competence to determine violations of the Covenant in the absence of a specific legal claim. The Committee must carefully assess the evidence submitted by the parties; if the facts before the Committee reveal a violation of the Covenant, the Committee can and should — in accordance with the principle of *iura novit curiae* — examine the legal framework of the case. The legal basis for this position and explanation of why this does not mean that States will be left without a defence have already been provided in separate opinions whose basic thrust we endorse.^a

(a) Violation of article 2, paragraph 2, of the Covenant

4. The international responsibility of the State may be engaged by the action of the legislative branch or any other branch of government that has legislative power under the country's legal system. The failure to fulfil the obligation laid down in article 2, paragraph 2, of the Covenant engages such responsibility by virtue of an act (adopting incompatible legislation) or omission (not bringing national legislation into line with the provisions of the Covenant following its ratification).^b

5. The State of Belarus ratified the Covenant on 12 November 1973, and, on 20 December 1997, adopted the Public Events Act, which sets out the penalties under the Code of Administrative Offences. Article 8 of the Act, which prohibits the production and dissemination of information on public events before permission to hold such events has been granted, undermines the right to impart information, as provided for in article 19 of the Covenant. In fact, article 8 of the Public Events Act facilitates the violation of article 19 by the State authorities by allowing them to impose broad restrictions on freedom of expression. It is therefore incompatible with the Covenant and violates the obligation to give effect to the rights recognized therein, as set forth in article 2, paragraph 2, read in conjunction with article 19.

^a See communication No. 1406/2005, *Weerawansa v. Sri Lanka*, partially dissenting opinion of Mr. Fabián Salvioli.

^b See communication No. 1838/2008, *Tulzhenkova v. Belarus*, individual opinion of Mr. Fabián Salvioli, paras. 5–8.

6. Mr. Olechkevitch sets out clearly his complaint about the application of the legislation to him in paragraphs 2.1 and 3 of the present communication. Moreover, the Committee takes note of the author's statement that "the provisions of the State party's Public Events Act that restrict the right to impart information cannot be considered to conform to the State party's obligations under the Covenant" (Committee's Views, para. 2.5).

7. The author could not have been clearer in his allegation, which the State had every opportunity to contest and refute in its reply and additional observations submitted to the Committee. We therefore consider that the Human Rights Committee should have indicated that the State party violated article 2, paragraph 2, of the Covenant, read in conjunction with article 19, in addition to, quite rightly, finding a separate violation of article 19.

(b) Violation of article 19 read in conjunction with article 21

8. Another factor to be taken into account is the general context in which the events took place: the leaflets had a purpose that the Committee cannot disregard in its analysis – to invite people to a public meeting. The basic objective of the restriction under article 8 of the 1997 Act, as applied to the author, was to prevent the meeting from being held. As a result, the author's enjoyment of the right of peaceful assembly, as guaranteed under article 21 of the Covenant, was violated. When a State party attempts to justify restrictions on freedom of expression, the burden of proof must be particularly high, so as to ensure that the restriction does not curb the enjoyment of one or more of the rights enshrined in the Covenant. This condition has not been met in the present case.

9. The right of peaceful assembly is guaranteed by article 21 of the International Covenant on Civil and Political Rights. The facts before the Committee reveal that prohibiting the distribution of leaflets in the present case gave rise to a violation of the right to freedom of expression (art. 19) and also of article 19 read in conjunction with article 21, since the right of peaceful assembly was also violated.

(c) Decision on the merits of the Olechkevitch case

10. Consequently, in our opinion, paragraph 9 of the Committee's Views should have read as follows:

In light of the above, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 19 (para. 2), article 19 read in conjunction with article 21, and article 2 (para. 2) read in conjunction with article 19 of the International Covenant on Civil and Political Rights.

(d) Reparation in the Olechkevitch case: consolidation of progress in the Committee's jurisprudence

11. Paragraph 10 of the Committee's Views in the Olechkevitch case seeks not only to provide a general remedy for the author, but also specifies how to guarantee non-repetition, by indicating that the State party should review its legislation, particularly the Public Events Act, and its implementation, to ensure that it is compatible with article 19 of the Covenant. In cases like the present one, therefore, the Views consolidate the progress made by the Committee in the area of reparations since the adoption of the Views in the case of

Schumilin v. Belarus,^c which modified the position taken by the Committee in the Tulzhenkova case.^d

[Done in Spanish. Subsequently to be issued also in Arabic, Chinese, English, French and Russian as part of the present report.]

^c Communication No. 1784/2008, *Schumilin v. Belarus*, para. 11.

^d Communication No. 1838/2008, *Tulzhenkova v. Belarus*.

**K. Communication No. 1786/2008, *Kim et al. v. Republic of Korea*
(Views adopted on 25 October 2012, 106th session)***

<i>Submitted by:</i>	Jong-nam Kim et al. (represented by counsels, André Carbonneau and Hana Lee)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	The Republic of Korea
<i>Dates of communication:</i>	15 January, 16 January and 25 April 2008 (initial submissions)
<i>Subject matter:</i>	Alternative to compulsory military service; conscientious objection
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Right to freedom of thought, conscience and religion
<i>Article of the Covenant:</i>	18, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2012,

Having concluded its consideration of communication No. 1786/2008, submitted to the Human Rights Committee on behalf of Jong-nam Kim et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

An individual (concurring) opinion signed by Committee member Mr. Michael O'Flaherty is appended to the present Views.

An individual (concurring) opinion signed by Committee member Mr. Walter Kälin is appended to the present Views.

An individual (concurring) opinion signed by Committee members Mr. Gerald Neuman and Mr. Yuji Iwasawa is appended to the present Views.

An individual (concurring) opinion signed by Committee member Mr. Fabián Omar Salvioli is appended to the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are 388 persons,¹ all nationals of the Republic of Korea. They claim to be victims of a violation by the State party of their rights under article 18, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 10 April 1990. The authors are represented by counsels André Carbonnier and Hana Lee.

The facts as presented by the authors

2.1 All 388 authors are Jehovah's Witnesses who have been sentenced to 18 months of imprisonment each for refusing to perform compulsory military service due to their religious beliefs.² Sixteen authors appealed their first-instance sentences to the Supreme Court of Korea, which refused to recognize their rights as conscientious objectors. The authors note that Supreme Court of Korea, on 15 July 2004, and the Constitutional Court of Korea, on 26 August 2004, decided that conscientious objectors must serve in the army or face prison terms. In a ruling, the Constitutional Court rejected a constitutional challenge to article 88 of the Military Service Act on the grounds of incompatibility with the protection of freedom of conscience, as proclaimed under the Korean Constitution. The Court stated, *inter alia*, that:

“the freedom of conscience, as expressed in Article 19 of the Constitution, does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual's conscience, and therefore is not a right that allows for the refusal of one's military service duties for reasons of conscience, nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. [...]”

2.2 The authors claim that since the highest courts of Korea had already rendered a final decision on the issue, any further appeal would be ineffective.

2.3 The authors state that since the decisions of the Supreme and Constitutional courts, some 600 to 700 conscientious objectors have been sentenced and imprisoned for refusing to bear arms. Others are convicted and imprisoned each month.

The complaint

3. The authors claim that the absence of an alternative to compulsory military service in the State party amounts to a violation of their rights under article 18, paragraph 1, of the Covenant. They refer to the Committee's Views in communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, adopted on 3 November 2006, in which the Committee concluded that the State party had breached article 18, paragraph 1, of the Covenant, on the basis of identical facts as those in the present communication, and the State party was requested to provide the authors with an effective remedy.

State party's observations on admissibility and merits

4.1 By note verbale of 14 November 2008, and with reference to the Committee's Views of 3 November 2006 in *Yoon and Choi v. the Republic of Korea*, the State party

¹ The list of authors is annexed to the present Views.

² All the authors declare that they had received their draft notices to perform military service between September 2004 and May 2007. All the authors were sentenced, between February 2006 and February 2008, to 18 months' imprisonment.

requests the Committee to reconsider its decision, taking into account the security environment in the Korean peninsula. Concretely, regarding the Committee's observation in its previous Views that "an increasing number of States parties to the Covenant, which have retained compulsory military service, have introduced alternatives to compulsory military service," the State party points out that the legal systems of Germany and Taiwan, countries which have introduced alternative service, are quite different from its own. The State party also notes that Taiwan has not been at war, while the Korean War was fought across the Korean peninsula and lasted for three years and one month from 1950 to 1953, when a cease-fire agreement was finally signed. The war left one million dead from the south, and more than 10 million Koreans were separated from their families. The State party submits that the cease-fire agreement is still effective in the State party, which distinguishes it from other countries. The agreement has not yet been superseded by a new legal framework, such as a declaration to end the war or a peace agreement to ensure non-aggression and peace, despite continued efforts to this end. In the State party's view, the security environment is not comparable to that of either Germany or Taiwan, as it shares a border with the Democratic People's Republic of Korea (DPRK) which spans 155 miles.

4.2 As to the Committee's contention that "the Republic of Korea has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 were fully respected," the State party submits that conscientious objection or the introduction of an alternative service arrangement is closely linked to national security, which is the very prerequisite for national survival and the liberty of the people. It fears that introduction of an alternative to military service would jeopardize national security.

4.3 According to the State party, there have always been those who are intent on evading conscription due to the relatively challenging conditions often required in the military, or concerned over the effect such an interruption will have on one's academic or professional career. Thus, it is even more necessary to maintain the current policy of no-exception to military service so as to ensure sufficient ground forces. The State party adds that if it were to accept claims of exemption from military service, in the absence of public consensus on the matter, it would be impeded from securing sufficient military manpower required for national security by weakening the public's trust in the fairness of the system, leading the public to question its necessity and legitimacy. Thus, for the State party, the recognition of conscientious objection and the introduction of alternative service arrangements should be preceded by a series of measures: stable and sufficient provisions of military manpower; equality between people of different religions as well as those with no religion; in-depth studies on clear and specific criteria for recognition of an exemption and consensus on the issue among the general public.

4.4 As to the Committee's argument that "respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society," the State party is of the view that as a unique security environment prevails, fair and faithful implementation of mandatory military service is a determining factor to secure social cohesion. Respect for conscientious beliefs and its manifestations cannot be enforced through the implementation of a system alone. It is sustainable only if general agreement on the issue is achieved. Public opinion polls conducted in July 2005 and in September 2006 showed that 72.3 per cent and 60.5 per cent, respectively, expressed opposition to the recognition of alternative service for conscientious objectors.

4.5 The State party submits that it is very difficult to set up an alternative service in practice, guaranteeing equality and fairness between those performing military and those performing alternative service. The majority of the soldiers in the State party perform their duties under difficult conditions and some are involved in life-threatening situations. They face the risk of jeopardizing their lives while performing their duty of defending the

country. Indeed, six people died and 19 were wounded in the clash between South and North naval vessels in the Yellow Sea in June 2002. Thus, it is almost impossible to ensure equality of burden with those fulfilling military service and those performing an alternative one.

4.6 The State party regrets that upon its accession to the Covenant on 10 April 1990, the Committee had not provided a clear position on whether conscientious objection fell within the ambit of article 18. It was only on 30 July 1993, in its general comment No. 22 that the Committee announced its position that failure to recognize conscientious objection constituted a breach of this provision. The State party points out that both its Supreme and Constitutional Courts had ruled that the failure to introduce a system at the present time cannot be interpreted as a breach of the Covenant, and that the requisite article of the Military Service Act which punishes conscientious objectors is in conformity with the Constitution.

4.7 The State party adds that from April 2006 to April 2007, the Ministry of Defence had set up a "Joint Committee between the public and private sectors to research the alternative service system." The Committee conducted research on the possibility of revising the Military Service Act and introducing an alternative service system, including prospects for the future demand and supply of military personnel, the statements of those who refused military service, the opinions of experts in this field and relevant cases of foreign countries.³

4.8 In addition, in September 2007, the authorities announced a plan to introduce a system assigning social services to those who refuse conscription due to their religious beliefs, once there is a "public consensus" on the issue. The State party indicated that once such consensus is reached, "as a result of the research on public opinion and positions of the relevant Ministries and institutions," it would consider introducing an alternative service system. In conclusion, it requests the Committee to reconsider its previous view on this matter, in the light of the arguments presented.

Authors' comments

5.1 In their comments dated 23 February 2009, the authors note that their claims are identical to those in communications Nos. 1321 and 1322/2004 submitted by Yoon Yeobum and Choi Myung-jin,⁴ in which the Committee found a violation of article 18 of the Covenant. The authors deplore the State party's failure to implement its national action plan for conscientious objection.

5.2 With respect to the State party's argument on the necessity to preserve national security, the authors note that countries like the United Kingdom of Great Britain and Northern Ireland, the Netherlands, Norway, Denmark or Russia had all adopted laws recognizing the rights of conscientious objectors during war time. There is no evidence that those laws weakened the States' national security. Another example is the State of Israel, which, since 1948, has been involved in military confrontations that have resulted in a much higher number of casualties than those the Republic of Korea has experienced over the last 50 years. The State of Israel, nevertheless, exempts conscientious objectors from military service. The authors conclude that recognition of conscientious objection does not compromise a country's national security.

³ The State party has not provided any indication of the results of this research.

⁴ Communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006.

5.3 The authors further contend that the current number of conscientious objectors in the State party amounts to two per cent of those enlisted for military service each year; this number is not high enough to have any type of influence on the ability of the State party to defend itself. They further note that conscientious objectors do not serve the army, but spend time in prison, which, in their view, suggests that the State party's refusal to recognize conscientious objectors and to allow alternative service has not contributed to improving or maintaining its national security. As for the State party's fear that recognizing the right to conscientious objection would lead to an increase in requests from Buddhists, Catholics, and others from the Christian faith, the authors contend that there is no record in any country which has introduced alternative service for conscientious objectors of a substantial increase in requests for exemption from the ranks of Buddhists, Catholics and others from the Christian faith.

5.4 With regard to State party's argument of the alleged necessity to preserve social cohesion, the authors reply by quoting a United States of America Supreme Court ruling of 1943, in which it was considered that fundamental freedoms do not depend on the outcome of elections.⁵ The authors argue that public opinion cannot excuse a breach of the Covenant, or of the State party's own Constitution. The State party's Constitution protects fundamental rights, including the right to freedoms of conscience and religion. Thus, domestic law, which includes the Covenant, protects such rights and therefore protects the authors' right to conscientious objection. The authors, further contend that reliance on public polls can be misleading; on 18 September 2007, when the Ministry of Defence announced that it had decided to introduce alternative civilian service for conscientious objectors, it made reference to a poll showing that 50.2 per cent of the population consented to the introduction of an alternative to military service. The authors quote two other polls showing a similar trend.

5.5 As for the State party's argument that when it acceded to the Covenant, the Committee had not yet issued its general comment No. 22 broadening the scope of article 18 to the right to conscientious objection, the authors point out that subsequent to the State party's accession to the Covenant, it became a member of the then Human Rights Commission, which adopted resolutions on the rights of conscientious objectors in 1993, 1995, 1998, 2000, 2002 and 2004. The State party did not object to any of them.

5.6 On 16 January 2012, the authors inform the Committee that in two judgements of 30 August 2011, the Constitutional Court stated the following:

"[...] no article in the Covenant, including article 18, explicitly mentions a right to conscientious objection as one of the basic human rights [...]. The interpretation of the Committee [...] is merely a recommendation to its States parties, but is not legally binding [...]. Therefore, the Covenant does not automatically mean the recognition of the right to conscientious objection, nor does it exercise legally binding effect upon conscientious objection."⁶

⁵ Supreme Court of the United States, *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624, 639 (1943).

⁶ Constitutional Court of Korea, case 2008 Hun Ga 22, 2009 Hun Ga 24, 2010 Hun Ga 16, 2009 Hun Ga 7, 2010 Hun Ga 37, 2008 Hun Ba 103, 2009 Hun Ba 3 of 30 August 2011, para. 3.3.2.1; Constitutional Court of Korea, case 2007 Hun Ga 12, 2009 Hun Ba 103 (consolidated) of 30 August 2011, para. 3.4.2.1.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes that, apart from the 16 authors mentioned in para. 2.1 above, the majority of the authors have not appealed the judgements of the respective District Courts on the basis that any appeal would have been ineffective. The Committee notes the authors' contention that both the Supreme Court of Korea, on 15 July 2004, and the Constitutional Court, on 26 August 2004, as well as most recently on 30 August 2011, decided that conscientious objectors must serve in the army or face prison terms; and since the highest jurisdictions had made a final decision on the issue, any further appeal would be futile. Taking into account the authors' arguments, and in absence of any objection by the State party in this connection, the Committee considers that it is not precluded by the provisions of article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

6.4 The Committee considers that the authors have sufficiently substantiated their claims, for purposes of admissibility; it declares the communication admissible under article 18, paragraph 1, of the Covenant, and proceeds to its consideration of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the authors' claim that their rights under article 18, paragraph 1, of the Covenant have been violated, due to the absence in the State party of an alternative to compulsory military service and, as a result, they were prosecuted and imprisoned. The Committee notes that in the present case, the State party reiterates the arguments advanced in response to similar earlier communications⁷ before the Committee, notably on the issues of national security, equality between military and alternative service and lack of a national consensus on the matter. The Committee considers that it has already examined these arguments in its earlier Views,⁸ and finds no reason to depart from its earlier position.

7.3 The Committee recalls its general comment No. 22 (1993), in which it considers that the fundamental character of the freedoms enshrined in article 18, paragraph 1, of the Covenant is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4, paragraph 2, of the Covenant. Although the Covenant does not explicitly refer to a right of conscientious objection, the Committee reaffirms its view that such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience.⁹

⁷ Communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006; communications Nos. 1593-1603/2007, *Jung et al. v. the Republic of Korea*, Views adopted by the Committee on 23 March 2010.

⁸ Ibid.

⁹ See for example, communications Nos. 1642-1741/2007, *Jeong et al. v. the Republic of Korea*, Views

The Committee further notes that freedom of thought, conscience and religion embraces the right not to declare, as well as the right to declare, one's conscientiously held beliefs. Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to declare his or her conscientiously held beliefs by being under a legal obligation, either to break the law or to act against those beliefs within a context in which it may be necessary to deprive another human being of life.

7.4 The Committee therefore reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.¹⁰

7.5 In the present case, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs which, it is uncontested, were genuinely held, and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant. Repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18, paragraph 1, of the Covenant.¹¹

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts before it reveal, in respect of each author, violations by the Republic of Korea of article 18, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.

10. Bearing in mind that by becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

adopted by the Committee on 24 March 2011.

¹⁰ See for example, communications Nos. 1853 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted by the Committee on 29 March 2012, para. 10.4.

¹¹ See for example, communications Nos. 1642–1741/2007, *Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011.

Appendix I

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|--------------------|---------------------------------|
| 1. Jong-nam Kim | 27. Chan-ho Eom |
| 2. Hyun-suk Kang | 28. Bit Han |
| 3. Ue-dong Jeong | 29. Soon-hyun Hwang |
| 4. Hyun-ju Shin | 30. Jae-ha Lee |
| 5. Jun-tae Park | 31. Hyung-ju Kang |
| 6. Seung-tae Kim | 32. Jun-seok Oh |
| 7. Joon-ho Seok | 33. Jung-hyun Seo |
| 8. Hee-won Choi | 34. Jae-chul Chung |
| 9. Yang-ho Jung | 35. Sung-il Jang |
| 10. Jung-hoon Kwon | 36. Ki-yong Kim |
| 11. Su-min Park | 37. Dong-il Song |
| 12. Jun-won Seok | 38. Hyun-sung Ha |
| 13. Seul-gi Hong | 39. Sung-min Chung |
| 14. Bong-june Kim | 40. Min-jae Kim |
| 15. Hyung-chan Kim | 41. Byong-oh Ko |
| 16. Hyun-je Kim | 42. Sun-il Kwon |
| 17. Yeo-ma-ye Na | 43. Young-nam Choi |
| 18. Jae-il Hong | 44. Ji-won Min |
| 19. Hyung-won Kang | 45. Yeo-reum Yoon |
| 20. Kyung-hee Jo | 46. In-hee Kim |
| 21. Da-woon Jung | 47. Jeong-hun Ko |
| 22. Tae-song Kim | 48. Tae-ik Kwan |
| 23. Kyu-dong Park | 49. Jin-woong Kim |
| 24. Geon-uk Kim | 50. Ki-bok Sung |
| 25. Sul-ki Kwon | 51. Sang-il Ma ^a |
| 26. Gyeong-su Park | 52. Kyong-nam Choi ^a |

^a Messrs. Sang-gil Ma, Kyong-nam Choi, Seul-gi Lee, Jin-taek Choi, Yun-taek Hong, Eun-sang Lee, Young-il Jang, Won-il Ji, Kwang-hyun Kim, Seoung-ho Choi, Hyoung-mo Jeong, Ji-woong Kim, Yong-hun Jeung, Gang-hee Lee, Jin-woo Lee and Byoung-kwan Park were sentenced to 18 months' imprisonment by the lower court. Their appeals were rejected by the Court of Appeal and the Supreme Court.

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| 53. Seul-gi Lee ^a | 86. Jue-hune Park |
| 54. Jin-taek Choi ^a | 87. Deok-min Ahn |
| 55. Yun-taek Hong ^a | 88. Chung-jeol Lee |
| 56. Eun-sang Lee ^a | 89. Ho-young Lee |
| 57. Young-il Jang ^a | 90. Jun-young Lee |
| 58. Chang-yang Jung | 91. Chul-seung Yang |
| 59. Jin-geun Kim | 92. Jin-hwang Kim |
| 60. Seon-kyum Kim | 93. Hyun-woo Lee |
| 61. Min-kyu Park | 94. Ki-taek Lee |
| 62. Do-in Jun | 95. Hak-in Oh |
| 63. Kyu-myung Jung | 96. Barl-keun Lee |
| 64. Min-spp Kang | 97. Ju-hak Lee |
| 65. Yeong-chang Yu | 98. Song-taek Jeong |
| 66. Sung,hyun Son | 99. Ji-won Park |
| 67. Suk-dong Kim | 100. Sung-hyun Choi |
| 68. Doc-ho Her | 101. Sa-em Park |
| 69. Yang-hyun Ko | 102. Jin-gon Kim |
| 70. Jung-woo Hong | 103. Kwang-nam Kim |
| 71. Kyoung-soeb Lee | 104. Tae-hoon Uhm |
| 72. Min-kyu Lee | 105. Young-hoon Jang |
| 73. Jun-cheol Yoon | 106. Woo-jin Jung |
| 74. Jong-min Jang | 107. Myung-jin Kim |
| 75. In-goon Kim | 108. Sung-gyu Kim |
| 76. Myeong-seob Kim | 109. Jun-hyung Cho |
| 77. Sung-ho Kim | 110. Hyuung-duk Jeon |
| 78. Yong Kim | 111. Jae-myeong Kim |
| 79. Young-joon Kwon | 112. Kyung-hoon Kim |
| 80. Hee-sung Lee | 113. Jin-ho Park |
| 81. Joo-min Park | 114. Dae-an Kim |
| 82. Jung-joo Park | 115. Jae-sung Kim |
| 83. Hyun-dong Yang | 116. Jeong-hwan Lee |
| 84. See-won Kim | 117. Jae-min Lee |
| 85. Oh-hyun Kwon | 118. Jun-yeol Song |

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| 119. Sung-min Choi | 152. Jong-joon Lee |
| 120. Tae-jin Jeon | 153. Sung-jin Yoon |
| 121. Young-il Lim | 154. Yong-min Jeong |
| 122. Jae-yoon Lee | 155. Kwang-min Kim |
| 123. Sang-yoon Lee | 156. Geum-dong Lee |
| 124. Jong-chan Shin | 157. Ji-hun Shin |
| 125. Jun-cheol Shin | 158. Jin-hak Song |
| 126. Ji-min Kim | 159. Sung-geon Ye |
| 127. Bok-jin Lee | 160. Kwang-hyun Ahn |
| 128. Sung-geun Lee | 161. Jun-hyung An |
| 129. Young-hak Lee | 162. Bo-ram Han |
| 130. Jae-won Park | 163. Ho-jin Hwang |
| 131. Ji-ho Yoon | 164. Jeong-keun Jang |
| 132. Si-ik Ryu | 165. Nam-ho Kim |
| 133. Kyeong-ho Lim | 166. Byoung-oh Ko |
| 134. Seung-min Roh | 167. Jong-min Lee |
| 135. Young-il Cha | 168. Kyung-hoon Na |
| 136. Young-gwang Son | 169. Jung-won Park |
| 137. Dong-seok Yoon | 170. Chang-suk Kim |
| 138. Ji-sang Eun | 171. Jin-hee Kim |
| 139. Hang-kyoon Kim | 172. Hyun-seok Lee |
| 140. Jeong-ro Kim | 173. Bok-young Roh |
| 141. Man-suk Kim | 174. Jin-myung Yang |
| 142. Jong-min Lee | 175. Su-min Kim |
| 143. Ki-bum Uhm | 176. Sung-sil Kim |
| 144. Young-su Kim | 177. Tae-hee Lee |
| 145. Jae-hyuck Oh | 178. Hyung-min Lim |
| 146. Ji-hoon Park | 179. Sam Lim |
| 147. Ji-chang Jeon | 180. Jin-gi Park |
| 148. Dong-ho Kang | 181. Jong-hwan Park |
| 149. Hyun-min Lee | 182. Kyung-bin Park |
| 150. Jae-hyuk Lee | 183. Kook-chun Seol |
| 151. Lee-seok Kang | 184. Dong-deuk Sin |

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| 185. Gil-ho Song | 218. Se-hee Han |
| 186. Sung-pyo An | 219. Joon-tae Hwang |
| 187. Jun-song Choi | 220. Deuk-soo Kim |
| 188. Won-suk Choi | 221. Hyo-sung Kim |
| 189. Chong-ouk Kim | 222. Jae-won Kim |
| 190. Dong-yun Kim | 223. Pil-young Kim |
| 191. Doo-il Kim | 224. Tae-won Kim |
| 192. Jae-min Park | 225. Sung-hun Ko |
| 193. Ji-hoon Park | 226. Jeong-tae Lee |
| 194. Joon-kyu Park | 227. Su-hyeon Park |
| 195. Dae-ho Shin | 228. Hye-gang Seo |
| 196. Jae-gul Yoon | 229. Sung-yub Jung |
| 197. Hyo-jae Choi | 230. Dae-hyun Kang |
| 198. Tae-ho Eom | 231. Ja-won Kim |
| 199. Tae-hyun Hwang | 232. Jung-woo Kim |
| 200. Sung-young Kim | 233. Kyung-min Kim |
| 201. Jae-min Seol | 234. Hae-joon Kwon |
| 202. Sang-yeon Won | 235. Sang-suk Lee |
| 203. Chung-won Jeong | 236. Ji-yun Park |
| 204. Don-bum Joh | 237. Young-jae Park |
| 205. Chang-hwan Kim | 238. Young-wook Park |
| 206. Su-won Lee | 239. Dong-in Seon |
| 207. Young-bin Oh | 240. Ji-min Ham |
| 208. Jin-bum Park | 241. Yoon-suk Kim |
| 209. Dong-hwan Kim | 242. Kwang-eun Lee |
| 210. Sol Kim | 243. Hee-min Park |
| 211. Byeong-joo Ko | 244. Neong-kul Park |
| 212. Jung-ho Lee | 245. Seong-il Park |
| 213. Byung-hyun Oh | 246. Sung-yoon Park |
| 214. Sung-ryong Oh | 247. Jun-sub Shim |
| 215. Ki-soo Song | 248. O-nam Song |
| 216. Sung-hyun Yoon | 249. Hyun-woo Choi |
| 217. Sung-wan Go | 250. Il-jung Jo |

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| 251. Jeong-duk Kim | 284. Seok-min Lee |
| 252. Seung-woo You | 285. Joon-young Ahn |
| 253. Tae-jong Yu | 286. Young-jae Kim |
| 254. Hyun Baek | 287. Sun-Pil Hwang |
| 255. Cheong-won Bang | 288. Doo-sup Kim |
| 256. Sung-kook Jo | 289. Hyun-sub Kim |
| 257. Hong-won Kim | 290. Jae-jun Kim |
| 258. Sang-goo Lee | 291. Seung-hyun Jung |
| 259. Sung-won Lee | 292. Chung-yeol Choi |
| 260. Mun-gye Min | 293. Jae-hee Kim |
| 261. Han-gyol Soun | 294. Dong-hwan Ko |
| 262. Jun Yu | 295. David Shin |
| 263. Kyeong-tae Kang | 296. Sang-hyun You |
| 264. Han-gil Lee | 297. Dong-geun Kim |
| 265. Kyoung-jun Lee | 298. Cheon-ha-tongil Jeon |
| 266. Heung-soo Reu | 299. Seung-jin Jeon |
| 267. Gyo-sik Bae | 300. Hyun-il Jin |
| 268. Seung-sik Bae | 301. Chong-jul Kim |
| 269. She-Young Kim | 302. Myoung-chul Lee |
| 270. Seung-gwan Back | 303. Yeng-gol Nam |
| 271. Ki-hoon Choi | 304. Hyung-min Sim |
| 272. Chang-hoon Jeon | 305. Suk-hun Kang |
| 273. Seung-hwan Kim | 306. Kang-surk Kim |
| 274. Dong-yoon Lee | 307. Jung-kyu Kim |
| 275. Sung-min Park | 308. Kyung-yong Yoon |
| 276. Jun-ho Son | 309. Tae-jae Kim |
| 277. Seong-ki Jung | 310. Dong-wook Kim |
| 278. Yong-hwa Kim | 311. Keun-hi Choi |
| 279. Gang-geon Lee | 312. Tae-jong Park |
| 280. Jung-geun Yoo | 313. Woan-suk Suh |
| 281. In-jae Han | 314. Ji-min Yu |
| 282. Ha-rim Min | 315. Da-woon Kim |
| 283. Chan-hyuk Joun | 316. Youl-eui Ko |

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| 317. Byung-joon Lee | 350. Yoon-sik Kang |
| 318. Byeong-woo Do | 351. Dae-sung Yoon |
| 319. Jeong-hun Kim | 352. Joon-hwee An |
| 320. Sung-chan Kim | 353. Seung-ha Bang |
| 321. Yul-song Lee | 354. Sung-jin Han |
| 322. Ho-sung Son | 355. Hae-won Lee |
| 323. Jun-hyuk Kim | 356. Su-kwang Chae |
| 324. Jun-young Kim | 357. Hae-nam Jo |
| 325. Woon-pyo Hong | 358. Il-joong Lee |
| 326. Chul-min Kim | 359. Jeong-pyo Lee |
| 327. Dong-soo Park | 360. Min-che Yoon |
| 328. Dong-jin Kim | 361. In-chan Hwang |
| 329. Sung-mo Kim | 362. Da-Hyung Kim |
| 330. Hyun-sang You | 363. Sang-wook Yang |
| 331. Dong-jun Choi | 364. Kyung-ho Kim |
| 332. Dong-seon Choi | 365. Hyun-jin Lee |
| 333. Won Huh | 366. Young-ho Son |
| 334. Ki-ryang Kim | 367. So-chul Yoo |
| 335. Jin-hyuk Lee | 368. Ji-hwan Yoon |
| 336. Young-man Kim | 369. Jin-sung Lee |
| 337. Su-won Lee | 370. Jun-ho Bae |
| 338. Su-je Park | 371. Sang-il Jung |
| 339. In-chang Park | 372. Dong-hyeon Kim |
| 340. Seung-gyu Choi | 373. Kwang-sung Lee |
| 341. Dong-sub Kim | 374. Jong-in Lim |
| 342. Sung-min Choi | 375. Ho-young Noh |
| 343. Sung-woo Cho | 376. Won-il Ji ^a |
| 344. Sung-yup Ha | 377. Kwang-hyun Kim ^a |
| 345. In-kyu Choi | 378. Seoung-ho Choi ^a |
| 346. Jin-kyu Lee | 379. Hyoung-mo Jeong ^a |
| 347. Kyung-soo Lee | 380. Ji-woong Kim ^a |
| 348. Ju-ho Choi | 381. Yong-hun Jeung ^a |
| 349. Sung-min Joo | 382. Gang-hee Lee ^a |

383. Jin-woo Lee^a

386. Jun-sun Shim

384. Byoung-kwan Park^a

387. Hyun-kyu Moon

385. Se-ek You

388. Gook-il Jang

Appendix II

Individual opinion of Committee member Mr. Michael O’Flaherty (concurring)

I concur with the majority of the Committee in finding that the facts before the Committee reveal, in respect of each author, violations by the Republic of Korea of article 18, paragraph 1, of the Covenant. However, as I observed in separate opinions in the cases of *Atasoy and Sarkut v. Turkey* and *Jeong et al. v. the Republic of Korea*, the majority of the Committee adopted reasoning that is unconvincing. I consider that the Committee should use the approach that is employed in *Jung et al. v. the Republic of Korea*, and earlier cases. I have set out my position, which remains unchanged and will not be repeated here, in my opinions in the *Atasoy and Sarkut* and the *Jeong et al.* cases.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix III

Individual opinion of Committee member Mr. Walter Kälin (concurring)

I agree with the conclusion of the Committee that the State party has violated the rights of the authors under article 18 of the Covenant. The State party has not sufficiently shown that punishing the authors for refusing to perform military service for conscientious reasons and not providing them with the opportunity of an alternative service is a limitation of their right to manifest their belief as protected by article 18, paragraph 1, of the Covenant that is justified and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others in accordance with paragraph 3 of said provision. Therefore, the case should have been decided on the same basis as communications Nos. 1321 and 1322/2004.^a

I continue to have serious doubts as to the reasoning the majority adopted in *Atasoy and Sarkut v. Turkey*,^b and further developed in this case. In paragraph 7.3, the majority recalls paragraph 11 of the Committee's general comment No. 22 (1993) by highlighting that the right of conscientious objection is derived "from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience," and noting "that freedom of thought, conscience and religion embraces the right not to declare, as well as the right to declare, one's conscientiously held beliefs". It concludes that compulsory military service without possibility of alternative civilian service forces a person to declare his or her conscientiously held beliefs in violation of that freedom.

This reasoning is problematic in several regards. The majority's reference to general comment No. 22 is incomplete as there, the Committee accepted that "the obligation to use lethal force may conflict with the freedom of conscience *and* the right to manifest one's religion or belief" (emphasis added). With the latter reference (deleted by the majority) the Committee indicated that conscientious objection is based on two elements: strong conviction that performing military service is incompatible with the demands of conscience and the manifestation of this conviction by actually refusing to join the armed forces. While it is true that the freedom of thought, conscience and religion absolutely prohibits forcing anyone to divulge his or her inner convictions, the right to manifest such conviction in words or deeds may be limited under article 18, paragraph 3, of the Covenant. By disregarding the fundamental distinction made by article 18 between these two rights, the majority seems to assume that certain conscientious decisions, including the one not to perform military service, are privileged insofar as their manifestation deserves the absolute protection of the freedom of thought, conscience and religion. This approach implies that other convictions may not be worthy of such protection. Would the majority provide absolute protection to persons conscientiously refusing to pay taxes or to provide their children with any kind of education? If no, what are the criteria to distinguish between manifestations of conviction worthy of absolute protection and those expressions of one's beliefs that may be limited?

^a Communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006.

^b See communications Nos. 1853 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kälin (concurring).

The majority's approach dilutes and, in the long run, risks jeopardizing the very core meaning of the freedom of conscience, namely that the *forum internum* must be protected absolutely, even in the case of thoughts, conscientious convictions and beliefs considered offensive or illegitimate by authorities or public opinion. Freedom at its most basic level would be undermined if we would allow the State to assess what we think, feel and belief, even where we do not manifest these inner convictions.

Finally, it is difficult to understand the majority's assumption that the possibility of alternative civilian service would not force a person to declare his or her conscientiously held beliefs. Indeed, as long as such service would only be open to conscientious objectors, they would be required to explain why they are not in a position to perform military service. The absolute right not to be compelled to reveal one's thoughts or belief is the right to remain silent and not the right to raise claims vis-à-vis the State (here, to be exempted from military service) without giving any reasons.^c

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

^c Communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006.

Appendix IV

Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (concurring)

We concur on the Committee's conclusion that the State party has violated the rights of the authors under article 18 of the Covenant, but for somewhat different reasons than those given by the majority. In paragraphs 7.3 and 7.4 of its Views, the majority continues the recent trend in its jurisprudence that considers the right to conscientious objection to military service as part of the absolutely protected right to hold a belief, rather than as part of the right to manifest a belief in practice, which is subject to limitation under paragraph 3 of article 18. For the reasons expressed in a concurring opinion in *Atasoy and Sarkut v. Turkey*,^a we continue to adhere to the Committee's earlier approach, which treated conscientious objection as an instance of manifestation of belief in practice. We also conclude that the Republic of Korea has not provided a sufficient justification for denying the right of conscientious objection, as the Committee had found in prior cases applying its earlier approach to the situation in this State party.^b

We write separately on the present occasion to add a few further observations.

First, while we appreciate the efforts of the Committee and of individual members to elaborate reasons for the change of approach, we do not find them convincing. We do not see how they would successfully distinguish the activity the Committee considers "absolutely protected" from other pacifist activities that the Committee would regard as manifestations of belief in practice subject to proportionate limitation under paragraph 3, or from other religious activities that the Committee might regard as expressing values shared by the Covenant. These other religious practices are also entitled to respect, and yet remain subject to restriction when circumstances so necessitate.

Second, paragraph 7.3 of the present Views places some emphasis on the fact that individuals may be forced to declare their beliefs in order to avoid violating their consciences. We do not see how that emphasis is consistent with the general approach of the Committee to religious exemptions from facially neutral rules, which ordinarily requires claimants to assert their religious scruples in order to bring themselves within an exemption.

The majority's analysis in this case does not depend on any particular feature of the State party's conscription law, other than its failure to provide for conscientious objection. There is no argument here that the law discriminates on its face against religious practices, unlike in the case of *Singh v. France*,^c where the express singling out of religiously motivated apparel for disfavored treatment provided an important element in the Committee's analysis. Even in that situation, the Committee applied paragraph 3 of article 18, and gave the State party the opportunity to explain how its targeted restriction of

^a Communications Nos. 1853 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin (concurring).

^b Communications Nos. 1321 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006; communications Nos. 1593-1603/2007, *Jung et al. v. the Republic of Korea*, Views adopted by the Committee on 23 March 2010.

^c Communication No. 1852/2008, *Singh v. France*, Views adopted by the Committee on 1 November 2012.

religious practice was proportionate to the legitimate purposes it was designed to serve. We would similarly consider the State party's arguments here, but would then conclude that it has not sufficiently justified its denial of conscientious objection.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix V

Individual opinion of Committee member Mr. Fabián Salvioli (concurring)

1. I concur with the decision of the Human Rights Committee in the case of *Kim et al. v. the Republic of Korea* (communication No. 1786/2008) and with all the arguments set forth in its Views, which have consolidated the fundamental case law in respect of conscientious objection to compulsory military service, which was laid down following the decisions on communications 1642-1741/2007 (*Jeong et al. v. the Republic of Korea*) and which were adopted on the historic date of 24 March 2011 and re-asserted in the decision in the case of *Atasoy and Sarkut v. Turkey* (communications 1853 and 1854/2008) adopted on 29 March 2012.
2. The discussion within the Committee prior to the adoption of the decision in the case at hand of *Kim et al. v. the Republic of Korea* has led me to set out a number of thoughts on the matter.
3. As I indicated in my concurring opinion in the case of *Atasoy and Sarkut v. Turkey*, decisions have hitherto been limited to conscientious objection to performing compulsory military service, which the Committee has declared to be in violation of the International Covenant on Civil and Political Rights. The views adopted by the Committee since the *Jeong et al. v. the Republic of Korea* case, in direct application of article 18, paragraph 1, of the Covenant (and in a departure from the Committee's previous case law, which subjected domestic legislation to the test of article 18, paragraph 3, to decide on a possible violation) have taken into account the evolution of the right to freedom of conscience in contemporary international law.
4. Since the *Jeong et al. v. the Republic of Korea* and the *Atasoy and Sarkut v. Turkey* cases, and as has been reasserted in this case of *Kim et al. v. the Republic of Korea*, the Committee has developed a case law that reflects the considerable evolution, to date, of the right to conscientious objection to compulsory military service under the International Covenant on Civil and Political Rights. The Human Rights Committee holds that freedom of conscience and religion (article 18 of the Covenant) includes the right to conscientious objection to compulsory military service.
5. Conscientious objection to compulsory military service is inherent in the right to freedom of thought, conscience and religion; accordingly, compulsory military service is not only a violation of the right to practice a belief or religion, it is also a violation of the right to hold a belief or religion.
6. It follows that, in accordance with the contemporary interpretation of the Covenant, there can no longer be any restriction or possible justification to enable a State to compel a person to perform military service. The Committee has provided ample explanation for its new approach, which is legally robust, and reflects the evolution of the right to freedom of thought, conscience and religion.
7. In contrast, the minority position within the Committee is unable to explain how its stance provides better guarantees for human rights, and better fulfils the object and purpose of the Covenant. Were we to continue to apply the former interpretation — which enjoys the support of the minority — a State would be able to find reasons for compelling a person, against his or her will, to use weapons; to become involved in armed conflict; to run the risk of dying and, what is even worse, of killing, without such act(s) constituting a violation of the Covenant.

8. Which of these two interpretations better fulfils the object and purpose of the Covenant? Which interpretation better contributes to the effective application of the International Covenant on Civil and Political Rights? Which of them better guarantees the rights of individuals? The answer is indisputable, and the Committee should ask these questions of itself each time it decides on a case.

9. The Committee should not revert to its previous case law; were it to do so, it would be a serious retrograde step that would be unacceptable from the angle of better international protection for human rights.

10. The Committee has set out its position on the content of article 18 of the Covenant; States should take due note of this and honour the commitments they entered into when they ratified the International Covenant on Civil and Political Rights.

11. States parties should adopt legislation to amend their domestic law in such a way that compulsory military service becomes a thing of the past and an example of a form of oppression that should never have existed. Until this comes to pass, when examining the reports of States parties and in its case law on individual cases, the Committee should maintain its progressive approach towards conscientious objection to compulsory military service.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**L. Communication No. 1787/2008, *Kovsh (Abramova) v. Belarus*
(Views adopted on 27 March 2013, 107th session)***

<i>Submitted by:</i>	Zhanna Kovsh (Abramova) (represented by counsel, Roman Kisliak)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	4 April 2008 (initial submission)
<i>Subject matter:</i>	Failure to promptly bring the author before a judge on two separate occasions
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of a claim
<i>Substantive issues:</i>	Right to be brought promptly before a judge; right to a public hearing by an independent and impartial tribunal
<i>Articles of the Covenant:</i>	9, paragraph 3; and 14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2013,

Having concluded its consideration of communication No. 1787/2008, submitted to the Human Rights Committee by Zhanna Kovsh (Abramova) under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Zhanna Abramova, a national of Belarus born in 1983. Subsequent to the submission of the communication, she got married and changed her surname to Kovsh. The author claims to be a victim of a violation by Belarus of her rights under article 9, paragraph 3, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. She is represented by counsel, Roman Kisliak.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval. The text of an individual opinion by Committee member Mr. Yuji Iwasawa is appended to the present Views.

1.2 On 4 August 2008, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with Rule 97, paragraph 3, of the Committee's rules of procedure. On 4 September 2008, the Special Rapporteur for New Communications and Interim Measures decided, on behalf of the Committee, to examine the admissibility of the communication together with its merits.

The facts as presented by the author

2.1 At 9.30 a.m. on 29 September 2005, the author was detained by two police officers on the territory of the Brest central market and taken to the Department of Internal Affairs of the Leninsky District Administration of Brest (Department of Internal Affairs). Her detention was authorised by the Head of the Department of Internal Affairs and was carried out in accordance with procedure established by article 108 of the Criminal Procedure Code. At 1 p.m. on the same day, the author was placed in a temporary detention ward of the Directorate of Internal Affairs of the Brest Regional Executive Committee (Directorate of Internal Affairs). At 10.30 p.m. on 1 October 2005, she was released from detention. During the 2 days and 13 hours (61 hours) from the moment of actual detention until the moment of her release, the author was not brought before a judge.

2.2 At 9.00 a.m. on 27 January 2006, the author was again detained in front of her house by two police officers in civilian clothes and then placed in the temporary detention ward of the Directorate of Internal Affairs. Her detention was authorised by the Chief Investigator of the Preliminary Investigation Unit of the Directorate of Internal Affairs pursuant to article 111 of the Criminal Procedure Code. At 9.00 a.m. on 30 January 2006, the author was released from detention. During the 3 days (72 hours) from the moment of actual detention until the moment of her release, the author was not brought before a judge.

2.3 On 23 October 2007, the author complained to the Leninsky District Prosecutor of Brest about the failure of the relevant authorities to bring her promptly before a judge on both occasions (29 September 2005 and 27 January 2006), in accordance with article 9, paragraph 3, of the Covenant. The purpose of the complaint was for the Leninsky District Prosecutor of Brest to recognise that the failure to bring the author promptly before a judge was unlawful and violated her right to liberty and security of person. On 12 November 2007, she received a reply dated 5 November 2007 from the acting Leninsky District Prosecutor of Brest, stating that there was no violation of law and that the decisions concerning her detention were taken in conformity with the State party's law in force. The decision does not make any reference to article 9, paragraph 3, of the Covenant.

2.4 On 18 November 2007, the author filed a complaint with the Brest Regional Prosecutor, claiming a violation of article 9, paragraph 3, of the Covenant. On 5 January 2008, she received a reply dated 20 December 2007 from the Deputy Brest Regional Prosecutor, who did not find any grounds to establish that the actions of the police officers, that is, not bringing her promptly before a judge, were unlawful under the State party's law in force. The decision does not make any reference to article 9, paragraph 3, of the Covenant.

2.5 On 15 January 2008, the author submitted a complaint to the Prosecutor General, challenging the earlier decisions of the Leninsky District Prosecutor of Brest and of the Brest Regional Prosecutor, as well as the failure of the relevant authorities to bring her promptly before a judge. On 29 February 2008, the author received a notification from the Prosecutor General's Office dated 26 February 2008, informing her that the complaint was transmitted to the Brest City Prosecutor's Office. On 3 March 2008, she learnt that the complaint was further transmitted to the Brest Regional Prosecutor's Office.

2.6 On 4 April 2008, the author received a reply dated 31 March 2008 from the Brest Regional Deputy Prosecutor, which states that article 9 of the Covenant does not establish a

specific time limit for bringing a detained person before a judge. Consequently, the State party's law is not incompatible with the Covenant, as article 143 of the Criminal Procedure Code envisages that the authority in charge of criminal proceedings is obliged, within 24 hours from the moment of receiving a complaint about detention, to hand it over to the court. Since on both occasions the author did not appeal against her detention either to the court or to the prosecutor while being detained, there was no violation of either international or national law.

2.7 The author submits that she has exhausted all domestic remedies. She adds, however, that these remedies are not effective for the protection of the rights guaranteed under article 9, paragraph 3, of the Covenant, because the State party's law generally does not provide for such remedies as far as the right to be brought before a judge is concerned.

The complaint

3.1 The author claims a violation by the State party of her rights under article 9, paragraph 3, of the Covenant, because she was not brought promptly before a judge on two separate occasions, i.e. during her detention from 29 September to 1 October 2005 and from 27 January to 30 January 2006. She submits that the requirement of "promptness" would require that a person is brought before a judge within 48 hours from the moment of actual detention. In any case, each State party to the Covenant should establish in its national law a time-limit on bringing every detained person before a judge that would be in compliance with article 9, paragraph 3, of the Covenant.

3.2 The author submits that the Criminal Procedure Code does not recognise any right that is analogous to article 9, paragraph 3, of the Covenant. At the same time, under article 1, paragraph 4, of the same Code, "International treaties of the Republic of Belarus that define rights and freedoms of individuals and citizens shall apply in criminal proceedings along with the present Code". Therefore, the author claims that on both occasions when she was detained, the officers of the Department of Internal Affairs should have directly applied the provisions of article 9, paragraph 3, of the Covenant and brought her before a judge within 48 hours from the moment of actual detention.

3.3 As to the argument of the Brest Regional Deputy Prosecutor (see, paragraph 2.6 above) that she had not appealed to a court the decisions on her detention, the author submits that a right of appeal is provided for in article 9, paragraph 4, rather than in article 9, paragraph 3, of the Covenant. The two provisions in question are not dependent on each other, i.e., the fact of not availing oneself of the right provided for in article 9, paragraph 4, does not preclude a person from exercising his or her right provided for in article 9, paragraph 3, of the Covenant.

3.4 As to the argument of the Brest Regional Deputy Prosecutor that article 9 of the Covenant does not establish a specific time limit for bringing a detained person before a judge, the author refers to the Committee's general comment No. 8 (1982) on the right to liberty and security of persons,¹ where it noted that the right to be brought promptly before a judge means that the delay "should not exceed a few days". She also refers to the Views in communication No. 852/1999, *Borisenko v. Hungary*,² where the Committee considered the detention which lasted three days, before bringing a detainee before a judicial officer, as too long and not fulfilling a condition of "promptness", provided for in article 9, paragraph 3, of the Covenant, except when there are solid reasons for the delay.

¹ General comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 2.

² Communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4.

State party's observations on the admissibility and merits

4.1 On 4 August 2008, the State party submits in relation to the facts on which the communication is based that the Brest Regional Prosecutor's Office has repeatedly examined the author's complaints with respect to the criminal case initiated by the Department of Internal Affairs against her. Since for a long time the author did not come to the Department of Internal Affairs despite the summons issued in her name, the authority in charge of criminal proceedings decided to declare her wanted by the police. Subsequently, the authority in charge of criminal proceedings took a decision to detain the author on the suspicion that she had committed a crime.

4.2 The State further party submits that the author was interrogated as a suspect in the presence of her lawyer and that there was no violation of criminal procedure law by officers of the Department of Internal Affairs in detaining her on 29 September 2005 and 27 January 2006.

4.3 The State party notes that in her communication to the Committee, the author claims that her rights under the Covenant were violated, because she has not been promptly brought before a judge. In this respect, the State party argues that article 9 of the Covenant does not establish a specific time limit for bringing a detained person before a judge. Consequently, article 143 of the Criminal Procedure Code is not incompatible with the Covenant, as it envisages that the authority in charge of criminal proceedings is obliged, within 24 hours from the moment of receiving a complaint about detention, to hand it over to the court together with the materials that would show the legality of one's detention. The State party adds that the author was explained in the presence of her lawyer the rights and duties of a detained person,³ including the right to appeal against the detention to the court. This fact is corroborated by the author's signature in the relevant report.

4.4 The State party argues that the author did not complain about the fact of her detention either to the court or to the prosecutor. She has only appealed against the decision to initiate a criminal case against her pursuant to article 211, part 1, of the Criminal Code. These complaints were examined by the Leninsky District Prosecutor of Brest in compliance with the State party's criminal procedure law. The State party concludes that there was no violation of either international or national law in the author's case and that her arguments on the unlawfulness of actions carried out by officers of the Department of Internal Affairs in detaining her are unfounded.

4.5 On 1 December 2009, the State party states that it reiterates its observations submitted on 4 August 2008.

Author's comments on the State party's observations

5.1 On 5 March 2012, the author submits that in its observations of 4 August 2008, the State party's did not challenge the fact that she was not brought before a judge on two separate occasions, i.e. during her detention from 29 September to 1 October 2005 and from 27 January to 30 January 2006. The author adds that she maintains her arguments presented in the initial submission of 4 April 2008 in support of the claim that the State party has violated her rights under article 9, paragraph 3, of the Covenant.

5.2 The author challenges the State party's argument that she did not appeal against the first and the second detentions either to the court or to the prosecutor (see, paragraph 4.4 above). She recalls that she has complained to the Prosecutor's Office on numerous occasions about the violation of her rights under article 9, paragraph 3, of the Covenant

³ Reference is made to article 139 of the Criminal Procedure Code.

(see, paragraphs 2.3–2.6 above). The author adds that, contrary to what is asserted by the State party, her complaints were in fact submitted to the district, regional and republican levels of the Prosecutor's Office.

5.3 As to the possibility of appealing against one's detention in relation to a criminal case while the person is still being detained, the author argues that it is pointless to appeal against one's detention that lasted for less than 72 hours with the aim of immediate release, because complaints submitted by detained persons themselves or their lawyers are only examined after 72 hours, i.e. when the detained person in question is either already released or ordered in custody upon the prosecutor's authorisation. For this reason, lawyers in Belarus would usually appeal against their client's placement in custody rather than against his or her detention.

5.4 On the facts, the author submits that she was detained for the first time on Thursday, 29 September 2005, and interrogated in the lawyer's presence only on Friday, 30 September 2005. She met with the ex officio lawyer made available to her by the investigator shortly before the interrogation and this lawyer was present only for as long as the interrogation lasted. It ended at 5.00 p.m. The author adds that it was impossible for her to conclude an agreement with a lawyer and to pay for the lawyer's services in appealing against her detention. In any case, such a complaint could have been submitted only on Friday evening, 30 September 2005, and would have reached the court only on Monday, 3 October 2005, i.e. after her release from detention.

5.5 The author further submits that she was detained for the second time on Friday, 27 January 2006, and was not provided with a lawyer on that occasion. Even if she had submitted an appeal against her detention on that day, the complaint would have been examined by the court only at 9.00 a.m. on Monday, 30 January 2006, at the earliest. The author recalls that she was released from detention at 9.00 a.m. on 30 January 2006. She adds that in the absence of legal background, she was unable to write such a complaint on her own. The author notes that investigators and other officers of the Ministry of Internal Affairs in Belarus often detain persons on the weekend's eve, which makes it absolutely impossible for the latter to promptly appeal against their detention due to the fact that lawyers cannot visit their clients in the temporary detention ward over the weekend.

5.6 The author submits that, on 27 December 2007, she complained to the Leninsky District Court of Brest pursuant to the provisions of articles 335 and 353 of the Civil Procedure Code about a violation of her rights under article 9, paragraph 3, of the Covenant. On 27 February 2008, a judge of the Leninsky District Court of Brest examined the author's complaint in her absence⁴ and decided to terminate the proceedings for lack of jurisdiction pursuant to article 164, paragraph 1, of the Civil Procedure Code. He determined that the procedure for appealing one's detention is governed by article 143 of the Criminal Procedure Code rather than by the Civil Procedure Code. The judge of the Leninsky District Court of Brest also concluded that the author has not provided the court with evidence, proving that in the course of her detention she had requested officers in charge of preliminary investigation to bring her before a judge.

5.7 The author notes that, although the ruling of the Leninsky District Court of Brest mentions that it was rendered in public, no public, including two persons who had specifically expressed their interest in attending the hearing in question was allowed to enter the court room by a clerk of court. She argues that, irrespective of whether parties to the proceedings are present in the court room, public should be allowed to attend public

⁴ The author stated that she was a few minutes late and entered the court room when the judge was already reading out the ruling.

hearings. The author claims, therefore, that her right to a public hearing by an independent and impartial tribunal provided for in article 14, paragraph 1, of the Covenant has been violated.

5.8 On 10 March 2008, the author filed a private appeal against the ruling of the Leninsky District Court of Brest of 27 February 2008. On 17 March 2008, a judge of the Leninsky District Court of Brest decided not to accept the private appeal on the ground that the author had missed the deadline to lodge the appeal. On 27 March 2008, the author filed a private appeal against the judge's decision of 17 March 2008, challenging the way how the deadline in question had been calculated, and, on 18 April 2008, she filed a supplementary private appeal against the ruling of the Leninsky District Court of Brest of 27 February 2008 with the Brest Regional Court. In her supplementary private appeal the author specifically argued that the obligation of the detaining authority to promptly bring her before a judge did not depend on whether or not she had requested it, as it should have been done automatically pursuant to article 9, paragraph 3, of the Covenant. On 21 April 2008, the Judicial College on Civil Cases of the Brest Regional Court rejected the author's private appeals and upheld the ruling of the Leninsky District Court of Brest of 27 February 2008 on the ground that the procedure for appealing one's detention was governed by article 143 of the Criminal Procedure Code rather than by the Civil Procedure Code.

5.9 The author argues that there are no effective remedies in Belarus as far as the right to be promptly brought before a judge, provided for in article 9, paragraph 3, of the Covenant, is concerned. She submits that the State party's authorities do not generally recognise the existence of the right to be promptly brought before a judge and simply substitute it with the right to appeal against one's arrest or detention. The author adds that the latter right is provided for in article 9, paragraph 4, of the Covenant, and that it complements the other right provided for in article 9, paragraph 3, of the Covenant. She concludes that, due to the conceptual misunderstanding by the State party's authorities of the right to be promptly brought before a judge and, thus, of her demands to remedy a violation of this right, any further attempts to avail herself of the domestic remedies would be futile.

5.10 With reference to the Committee's jurisprudence,⁵ the author recalls that domestic remedies need not be exhausted if they are either ineffective or unavailable. She argues, therefore, that the State party should have described in detail which domestic remedies would have been available to her in the present case and provided evidence that there would be a reasonable prospect that such remedies would be effective. The author concludes that the State party has failed to provide such evidence in relation to the right to be promptly brought before a judge pursuant to article 9, paragraph 3, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

⁵ Reference is made to communication No. 4/1977, *Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980, para. 9 (b).

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has not appealed against her first (from 29 September to 1 October 2005) and second (from 27 to 30 January 2006) detentions pursuant to the procedure established by article 143 of the Criminal Procedure Code. The Committee further notes, however, that the author's claim relates not to her right under article 9, paragraph 4, of the Covenant to bring proceedings before a court, but to her right under article 9, paragraph 3, of the Covenant, to be brought promptly before a judge, without having to request it, and observes that she conveyed her arguments in this respect to the State party's authorities by lodging complaints with the Leninsky District Prosecutor of Brest, the Brest Regional Prosecutor, the Prosecutor General, the Leninsky District Court of Brest and the Brest Regional Court. Accordingly, the Committee considers that it is not precluded, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

6.4 As to the alleged violation of the author's right under article 14, paragraph 1, of the Covenant, because no public was allowed to attend the hearing of the Leninsky District Court of Brest on 27 February 2008, the Committee considers that this claim has been insufficiently substantiated, for purposes of admissibility. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her claim under article 9, paragraph 3, of the Covenant. Therefore, it declares this claim admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claim that her rights under article 9, paragraph 3, of the Covenant were violated, because on two separate occasions, from 9.30 a.m. on 29 September to 10.30 p.m. on 1 October 2005 and from 9.00 a.m. on 27 to 9.00 a.m. on 30 January 2006, i.e. respectively, during 61 and 72 hours from the moment of the actual detention until the moment of her release, she was not brought before a judge. She submits that the requirement of "promptness" would require that a person is brought before a judge within 48 hours from the moment of actual detention. The Committee further notes the State party's argument that article 9 of the Covenant does not establish a specific time limit for bringing a detained person before a judge and that the author did not complain about the fact of her detention.

7.3 In this regard, the Committee recalls that pre-trial detention should be an exception and should be as short as possible.⁶ To ensure that this limitation is observed, article 9 requires that the detention be brought promptly under judicial control.⁷ Prompt initiation of judicial oversight also constitutes an important safeguard against the risk of ill-treatment of the detained person. This judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person. The period for evaluating

⁶ General comment No. 8 (1982) on the right to liberty and security of persons, note 1, para. 3.

⁷ See, for example, communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted 14 July 2006, para. 8.2.

promptness begins at the time of arrest and not at the time when the person arrives in a place of detention.⁸

7.4 While the meaning of the term “promptly” in article 9, paragraph 3, of the Covenant must be determined on a case-by-case basis,⁹ the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons¹⁰ and its jurisprudence,¹¹ pursuant to which delays should not exceed a few days. The Committee further recalls that it has recommended on numerous occasions in the context of consideration of the States parties’ reports submitted under article 40 of the Covenant, that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.¹² Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.¹³

7.5 In the present case, the Committee notes that the State party has failed to provide any explanations as to the necessity of detaining the author in a temporary detention ward of the Directorate of Internal Affairs for 61 and 72 hours without bringing her before a judge, other than the fact that she did not initiate a complaint. The inactivity of a detained person is not a valid reason to delay bringing her before a judge. In the circumstances of the present communication, the Committee considers that the detentions of the author were incompatible with article 9, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author’s rights under article 9, paragraph 3, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by her, as well as adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Criminal Procedure Code, to ensure its conformity with the requirements of article 9, paragraph 3, of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the

⁸ See, for example, communication No. 613/1995, *Leehong v. Jamaica*, Views adopted on 13 July 1999, para. 9.5.

⁹ See, for example, communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6.

¹⁰ General comment No. 8 (1982) on the right to liberty and security of persons, note 1V, para. 2.

¹¹ See, for example, *Borisenko v. Hungary*, note 2 above, para. 7.4; communication No. 625/1999, *Freemantle v. Jamaica*, Views adopted on 24 March 2000, para. 7.4; communication No. 277/1988, *Teran Jijon v. Ecuador*, Views adopted on 26 March 1992, para. 5.3; and communication No. 911/2000, *Nazarov v. Uzbekistan*, Views adopted on 6 July 2004, para. 6.2.

¹² See, for example, concluding observations on Kuwait, CCPR/CO/69/KWT, para. 12; concluding observations on Zimbabwe, CCPR/C/79/Add.89, para. 17; concluding observations on El Salvador, CCPR/C/SLV/CO/6, para. 14; concluding observations on Gabon (2001), para. 13.

¹³ See, *Borisenko v. Hungary*, note 2 above, para. 7.4. See also, Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principle 7.

measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee member Mr. Yuji Iwasawa

This opinion elaborates upon the reasoning of the Committee.

Under article 108, part 3 of the Criminal Procedure Code of Belarus, detention cannot exceed 72 hours from the moment of actual detention, after the expiry of which a suspect should be either released or subjected to restraint measures. The Prosecutor's Office can endorse such restraint measures as placement in custody after the expiry of 72 hours. Under article 108, part 4 of the Code, if a person is suspected of having committed a most serious crime as enumerated such as acts of international terrorism, the person may be detained for up to ten days, after the expiry of which the person can be subjected to further restraint measures.

The author claims that the Criminal Procedure Code does not recognise any right that is analogous to article 9, paragraph 3 of the Covenant, and this claim is not contested by the State party. Since article 1, part 4, of the Code provides that international treaties shall apply in criminal proceedings along with the Code, article 9, paragraph 3 of the Covenant presumably has the force of law and applies in criminal proceedings in Belarus.

In the present case, the police officers detained the author in a temporary detention ward of the Directorate of Internal Affairs on two separate occasions for 61 and 72 hours without bringing her before a judge. The author was not suspected of having committed a most serious crime as enumerated in article 108, part 4 of the Criminal Procedure Code, and thus article 108, part 3 applied to the author. The State party argues that article 9, paragraph 3 of the Covenant does not establish a specific time limit for bringing a detained person before a judge and that the author did not complain about the fact of her detention either to the court or to the prosecutor. Such arguments would defeat the purpose of article 9, paragraph 3 of the Covenant, which is to ensure that anyone detained on a criminal charge be brought promptly before a judge. Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person.^a

In such circumstances of the present case, the Committee found the detentions of the author to be incompatible with article 9, paragraph 3 of the Covenant.

[Done in English. Subsequently to be issued also in Arabic, Chinese, English, French, Russian and Spanish as part of the present report.]

^a See European Court of Human Rights, *McKay v. U.K.*, Application No. 543/03, 3 October 2006 (Grand Chamber), para. 34.

**M. Communication No. 1790/2008, *Govsha et al. v. Belarus*
(Views adopted on 27 July 2012, 105th session)***

<i>Submitted by:</i>	Sergei Govsha, Viktor Syritsa and Viktor Mezyak (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belarus
<i>Date of communication:</i>	31 March 2008 (initial submission)
<i>Subject matter:</i>	Denial of authorization to organize a peaceful meeting
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; freedom of assembly; permissible restrictions
<i>Articles of the Covenant:</i>	19 and 21
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2012,

Having concluded its consideration of communication No. 1790/2008, submitted to the Human Rights Committee by Sergei Govsha, Viktor Syritsa and Viktor Mezyak under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Sergei Govsha, born in 1949, Viktor Syritsa, born in 1953, and Viktor Merzyak, born in 1960. They are all Belarusian nationals and currently reside in Baranovichi, Belarus. The authors claim to be victims of a violation by Belarus of their rights under articles 19 and 21 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The authors are not represented.

1.2 On 30 July 2008, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 4 September 2008, the Special

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Rapporteur on new communications and interim measures decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

The facts as presented by the authors

2.1 As required by article 5 of the Law on Mass Events in the Republic of Belarus (hereinafter the Law on Mass Events), the authors submitted, on 24 August 2006, an application to the Baranovichi City Executive Committee, informing it about their intention to hold on 10 September 2006 a meeting of Baranovichi residents on the subject: "For the free, independent and prosperous Belarus" and asking for an authorization to organize the meeting in question. The application included all the necessary information, as stipulated by the Law on Mass Events, namely, the date, venue, timing of the planned meeting, estimated number of participants, measures to be taken to guarantee public order and security, medical facilities and cleaning of the territory at the end of the meeting. As the organizers, they undertook an obligation to conclude contracts with the relevant service providers and to pay for their services.

2.2 On 4 September 2006, the Baranovichi City Executive Committee denied the authorization to organize the meeting, on the ground that a meeting on a similar subject had already taken place on the Executive Committee's premises on 15 March 2006. The authors submit that neither national law nor international treaties ratified by Belarus allow for such a limitation on the conduct of peaceful assembly.

2.3 On 26 September 2006, the authors appealed the decision of the Baranovichi City Executive Committee of 4 September 2006 to the Court of the Baranovichi District and of Baranovichi City. In the appeal, they noted that under Presidential Decree No. 11 on Certain Measures for Improvement of the Procedure for the Conduct of Assemblies, Rallies, Street Processions, Marches and other Mass Events in the Republic of Belarus of 7 May 2001, an authorization for a meeting was to be granted when a respective application was accompanied by [copies of] certificates and contracts concluded with state service providers that were to provide for the security of participants at the mass event in question. The authors argued that the Presidential Decree did not contain any provisions that would allow the denial of an application containing a request to authorize a meeting on the ground that a meeting on the similar subject had already taken place in the past.

2.4 On 23 October 2006, the appeal was denied by the Court of the Baranovichi District and of Baranovichi City. During the court hearing, a representative of the Baranovichi City Executive Committee explained that the denial of the authorization to organize the meeting in question was based on the following grounds, in addition to the one mentioned in the decision of 4 September 2006:

(a) The application submitted to the Baranovichi City Executive Committee did not comply with all the requirements pertinent to this type of application stipulated in the first paragraph of article 4 of the Law on Mass Events.¹ Namely, the authors did not

¹ The first paragraph of article 4 of the Law on Mass Events reads: "Organizers of a gathering, meeting, street rally, demonstration, picketing, in which the participation of up to 1000 people is supposed, and of other mass events regardless of number of supposed participants can be citizens of the Republic of Belarus permanently residing on its territory who have reached eighteen years of age and who have the election right and who have been mentioned in the given number in the application on holding a mass event and who have taken in writing the obligation on its organization and holding in accordance with the present Law, and also political parties, trade unions and other organizations of the Republic of Belarus registered in established order, with exception of organizations of the Republic of Belarus which activities are suspended according to the legislative acts".

indicate in the application their respective years of birth, nationality and a purpose for the meeting;

(b) Contrary to the requirements of the fourth paragraph of article 6 of the Law on Mass Events² and clause 4 of the decision of the Baranovichi City Executive Committee No. 4 dated 17 January 2006, the application submitted to the Baranovichi City Executive Committee was not accompanied by receipts confirming that services relating to the protection of public order and security, medical facilities and cleaning of the territory at the end of the meeting had been paid;

(c) Contrary to the requirements of the second paragraph of article 8 of the Law on Mass Events,³ an announcement about the venue, timing, subject matter and organizers of the meeting was published in the *Intex-press* newspaper of 31 August 2006 before an authorization to organize the said meeting had been obtained by its organizers.

The Court of the Baranovichi District and of Baranovichi City determined that, although the decision of the Baranovichi City Executive Committee did not mention all the reasons for which it had denied the authorization to organize the meeting, the said decision was lawful and that the authors' appeal should, therefore, be denied as unfounded.

2.5 On 10 November 2006, the authors submitted a cassation appeal to the Judicial Chamber for Civil Cases of the Brest Regional Court, challenging the decision of the Court of the Baranovichi District and of Baranovichi City. They argued that:

(a) The application to the Baranovichi City Executive Committee complied with all the requirements of article 2⁴ and the fifth paragraph of article 5 of the Law on Mass Events;⁵

(b) Under paragraph 3 of article 10 of the Law on Mass Events,⁶ all expenses relating to the protection of public order and security, medical services and cleaning of the territory at the end of the meeting were to be paid no later than 10 days after the meeting in question took place. The authors, therefore, requested the Judicial Chamber for Civil Cases

² The fourth paragraph of article 6 of the Law on Mass Events reads: "The order of payment [of] the expenses connected with protection of public order, medical services and cleaning of the territory after holding the mass event is determined by the decision of the local executive and administrative body on the territory of which holding of the mass event is planned".

³ The second paragraph of article 8 of the Law on Mass Events reads: "Before the permission to hold the mass event is received, its organizer(s) and also other persons do not have the right to announce in mass media the date, place and time of its holding, prepare and distribute the leaflets, posters and other materials for this purpose".

⁴ Article 2 of the Law on Mass Events reads: "meeting – a mass presence of citizens in a certain place in open air gathered for public discussion and expression of their attitude towards actions (inaction) of persons and organizations, events of public and political life, and also for solving the problems affecting their interests".

⁵ The fifth paragraph of article 5 of the Law on Mass Events reads:

The following is indicated in the application: purpose, kind, place of holding the mass event; date of its holding, time of its beginning and end; routes of movement; supposed number of participants; name, middle and last name of an organizer (organizers), his/her (their) place of residency and work (study); measures on securing the public order and safety at holding the mass event; measures connected with medical service, cleaning the territory after holding the mass event; date of submitting the application.

⁶ The third paragraph of article 10 of the Law on Mass Events reads: "Organizer(s) of the mass event or the person(s) responsible for organization and holding the mass event are obliged: ... to make the payment of expenses connected with protection of public order, medical service and cleaning of the territory in accordance with the decision of [the] local executive and administrative body, on [the] territory of which the mass event was held, not later than 10 days after holding the mass event".

of the Brest Regional Court to revoke the decision of the Baranovichi City Executive Committee No. 4 dated 17 January 2006, referred to by the Court of the Baranovichi District and of Baranovichi City, because it was contrary to the Law on Mass Events in requiring that all the expenses relating to the organization of the meeting be paid six days before it was supposed to take place;

(c) An article containing information about the submission of an application to the Executive Committee with the request to authorize the holding of the meeting on 10 September 2006, which was published by a correspondent of the *Intex-press* newspaper, did not constitute "an announcement" about the said meeting within the meaning of paragraph 2 of article 8 of the Law on Mass Events.

2.6 On 4 December 2006, the Judicial Chamber for Civil Cases of the Brest Regional Court upheld the decision of the Court of the Baranovichi District and of Baranovichi City. It based its decision on the same grounds and arguments as those summarized in paragraph 2.4 (b) and (c) above. Under article 432 of the Civil Procedure Code, the ruling of the cassation court is final and becomes executory from the moment of its adoption.

2.7 On 3 February 2007, the authors submitted a request to initiate a supervisory review of the earlier decisions to the Chairman of the Brest Regional Court. On 26 February 2007, the Chairman of that Court concluded that there were no grounds on which to initiate a supervisory review of the earlier decisions. A similar request for a supervisory review was submitted by the authors on 10 July 2007 to the Chairman of the Supreme Court, who denied it on 27 August 2007.

2.8 The authors submit that they have exhausted all available domestic remedies in the attempt to exercise their right of peaceful assembly, guaranteed by article 35 of the Constitution.

The complaint

3.1 The authors claim a violation of their right of peaceful assembly, guaranteed under article 21 of the Covenant. They submit that (a) the State party's ban on the organization of the meeting in question amounts to an interference with their right of peaceful assembly; and (b) this interference constitutes an unjustified restriction of their right of peaceful assembly within the meaning of article 21 of the Covenant.

3.2 Firstly, the authors argue that such restriction is not in conformity with the law. To give effect to the right guaranteed under article 21 of the Covenant, the State party passed the Law on Mass Events, which spelled out the procedure for the organization and conduct of mass events, and established some restrictions on the exercise of the right of peaceful assembly. Article 10 of the said Law prohibits the organization of mass events aimed at promoting the change of the constitutional order by force or disseminating propaganda of war or social, national, religious or race hostility. Furthermore, under paragraph five of article 6 of the Law on Mass Events, the head of the local executive and administrative body or his deputy has a right to change the date, venue and time of the meeting upon agreement with the organizer(s) for the purposes of, inter alia, securing the rights and freedoms of citizens, as well as public safety. The authors note that the grounds on the basis of which the authorization for the organization of their peaceful meeting was denied are not provided for by law.

3.3 Secondly, the authors submit that the restriction did not pursue any of the legitimate aims provided for in article 21 of the Covenant. The meeting in question did not threaten the interest of national security or public safety, public order, public health, public morals or the protection of the rights and freedoms of others. The safety of the meeting was secured by the agreements with all relevant service providers: the police, the medical service, and the emergency situations department (see para. 2.1 above).

3.4 Thirdly, the authors state that the restriction was not necessary in a democratic society for achieving the purposes set out in article 21 of the Covenant. Namely, they argue that:

(a) Despite the autonomous role and sphere of the application of article 21, it should be considered in the light of article 19 of the Covenant. They refer to the Committee's jurisprudence, establishing that free dissemination of information and ideas not necessarily favourably received by the government or the majority of the population is a cornerstone of a democratic society.⁷ The authors respectively submit that the purpose of the meeting for which they had sought an authorization was to exchange views and information on the development of Belarus and its society;

(b) Any restrictions on the exercise of the right to freedom of expression must meet a strict test of justification.⁸ Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument among those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁹ States should ensure that reasons for the application of restrictive measures are provided.¹⁰ The authors claim, therefore, that the State party, through the decisions of the Baranovich City Executive Committee and the courts, did not provide for sufficient arguments and reasons in order to justify its restriction of their right of peaceful assembly. They further submit that a ban on the organization of a peaceful assembly, on the sole ground that a meeting on a similar subject had already been organized by the city administration, was not necessary for the protection of the values set out in article 21 of the Covenant and amounted to an unjustified restriction of their right of peaceful assembly.

State party's observations on admissibility

4.1 On 30 July 2008, the State party challenged the admissibility of the communication, arguing that the authors did not exhaust all available domestic remedies, since their case has not been examined by the prosecutorial authorities under the supervisory review procedure. It submits that under article 436 of the Civil Procedure Code, decisions that have already become final, except for the rulings of the Presidium of the Supreme Court, can be reviewed under the supervisory review procedure upon the referral of a case in question to the court by the officials listed in article 439 of the Civil Procedure Code.

4.2 The State party submits that according to article 439 of the Civil Procedure Code, the Brest Regional Prosecutor and the Prosecutor General and his or her deputies could also initiate a supervisory review of the authors' case and notes that they did not avail themselves of these avenues for appeal.

⁷ Reference is made to communication No. 1274/2004, *Korneenko v. Belarus*, Views adopted on 31 October 2006, para. 7.3.

⁸ Reference is made to communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005, para. 7.3.

⁹ Reference is made to the Committee's general comment No. 27 (1999) on freedom of movement, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A, para. 14. See also the Committee's general comment No. 34 on the freedoms of opinion and expression, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V, para. 34.

¹⁰ General comment No. 27, para. 15.

Authors' comments on the State party's observations

5.1 On 5 March 2009, the authors recall that under article 432 of the Civil Procedure Code, the ruling of the cassation court is final and becomes executory from the moment of its adoption. They add that an appeal submitted by an individual under the supervisory procedure does not automatically result in the review of the court decisions in question, which ultimately depends on the discretion of one of the officials listed in article 439 of the Civil Procedure Code on whether or not to initiate such a review.

5.2 The authors further submit that, according to the Committee's jurisprudence, one is required to exhaust domestic remedies that are not only available but also effective and provide a reasonable prospect of success.¹¹ In this regard, they note that the Committee has previously concluded that the supervisory review procedure constituted an extraordinary means of appeal that was dependent on the discretionary power of a judge or prosecutor and was not a remedy, which had to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The authors add that despite their reservations about the effectiveness of the procedure, they requested a supervisory review on two occasions (to the Chairman of the Brest Regional Court and to the Chairman of the Supreme Court) and that their requests were rejected. Furthermore, on 3 February 2007, they submitted a request to initiate a supervisory review of the earlier decisions in their case to the Brest Regional Prosecutor. This request was, however, denied by the Brest Regional Prosecutor on 5 March 2007.

State party's further observations on admissibility and merits

6.1 On 7 September 2009, the State party recalled the facts of the case and stated that, according to the decision of the Court of the Baranovichi District and of Baranovichi City of 23 October 2006, the denial of the authorization to organize the meeting on 10 September 2006 was based on the following grounds:

(a) A meeting on a similar subject had already taken place on the Baranovichi City Executive Committee's premises on 15 March 2006;

(b) Contrary to the requirements of article 5 of the Law on Mass Events and the decision of the Baranovichi City Executive Committee No. 4 dated 17 January 2006, the application submitted to the Executive Committee was not accompanied by receipts confirming that services relating to the protection of public order and security, medical facilities and cleaning of the territory at the end of the meeting had been paid;

(c) Contrary to the requirements of article 8 of the Law on Mass Events, an announcement about the venue, timing, subject matter and organizers of the meeting was published in the Intex-press newspaper before an authorization to organize the said meeting had been obtained by its organizers.

6.2 The State party reiterates its earlier argument that the authors did not exhaust all available domestic remedies. It submits that according to article 439 of the Civil Procedure Code, the Prosecutor General and his or her deputies could also initiate a supervisory review of the decision of the Court of the Baranovichi District and of Baranovichi City. The State party adds that 427 rulings have been revoked and 51 have been revised through the supervisory review procedure in civil cases in 2006. In 2007, the numbers were 507 and 30, respectively, and in 2008, 410 and 36. The State party concludes, therefore, that the

¹¹ Reference is made to communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 8.2.

authors' assertion in relation to the ineffectiveness of the supervisory review procedure is groundless.

Authors' comments on the State party's further observations

7.1 On 24 December 2009, the authors submitted their comments on the State party's further observations. The authors state that they are fully aware of the fact that the right of peaceful assembly is not an absolute right and that the exercise of this right can be restricted, provided that such restrictions are imposed in conformity with the law and are necessary for one of the legitimate purposes set out in article 21 of the Covenant. They add that such restrictions are indeed provided for in articles 23 and 35 of the Belarusian Constitution and article 10 of the Law on Mass Events.

7.2 The authors argue that the actions of the State party's authorities that effectively deprived them of their right of peaceful assembly are not in conformity with the criteria set out in article 21 of the Covenant for the following reasons:

(a) There are no provisions in the national law that would allow denying an application with the request to authorize a meeting on the ground that a meeting on a similar subject had already taken place in the past;

(b) The State party's authorities and courts that examined the authors' case did not provide sufficient arguments to suggest that the decision of the Baranovichi City Executive Committee to deny the authorization to organize the meeting on 10 September 2006 was prompted by the interests of national security, public safety and other values listed in article 21 of the Covenant;

(c) Such a ban on the organization of peaceful assembly is not necessary in a democratic society, the cornerstone of which is free dissemination of information and ideas not necessary favourably received by the government or the majority of the population.¹²

7.3 As to the State party's challenge to the admissibility of the present communication on the ground of non-exhaustion of domestic remedies, the authors reiterate their arguments summarized in paragraphs 5.1–5.3 above. They respectively submit that they have exhausted all available and effective domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the authors could have requested the Prosecutor General and his or her deputies to initiate a supervisory review of the decision of the Court of the Baranovichi District and of Baranovichi City,

¹² Reference is made to *Korneenko v. Belarus* (note 7 above), para. 7.3, and the European Court of Human Rights, *Handyside v. United Kingdom* (application No. 5493/72), judgement of 7 December 1976, para. 49.

specifically noting that the latter had the authority to initiate such a review in relation to a ruling that has already become final. The Committee further notes the authors' explanation that they had exhausted all available domestic remedies and had unsuccessfully requested a supervisory review from the Chairman of the Brest Regional Court, the Chairman of the Supreme Court and the Brest Regional Prosecutor. The Committee also notes the State party's objections in this respect, and in particular the statistical figures provided in support thereof, intending to demonstrate that supervisory review was effective in a number of instances. However, the State party has not shown whether and in how many cases supervisory review procedures were applied successfully in cases concerning freedom of expression and freedom of association.

8.4 The Committee recalls its previous jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.¹³ In the circumstances and specifically noting that the authors have appealed to the Chairman of the Brest Regional Court, the Chairman of the Supreme Court and the Brest Regional Prosecutor with the request to initiate a supervisory review of the decision of the Court of the Baranovich District and of Baranovich City, and that all these appeals were rejected, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

8.5 The Committee considers that the authors' claims under articles 19 and 21 of the Covenant are sufficiently substantiated for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the authors' claim that their rights to freedom of expression under article 19 and to freedom of assembly under article 21 of the Covenant were violated, since they were denied an authorization to organize a peaceful assembly aimed at the exchange of views and information on the development of Belarus and its society. In this context, the Committee recalls that the rights and freedoms set forth in articles 19 and 21 of the Covenant are not absolute but may be subject to restrictions in certain situations. In this regard, the Committee notes that since the State party imposed a procedure for organizing mass events, it effectively established restrictions on the exercise of the rights to freedom of expression and assembly and that, therefore, it must consider whether the respective restrictions imposed on the authors' rights in the present communication are justified under the criteria set out in article 19, paragraph 3, and the second sentence of article 21 of the Covenant.

9.3 The Committee recalls that for the restrictions on the right to freedom of expression to be justified under article 19, paragraph 3, of the Covenant, they shall be provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It also recalls that the second sentence of article 21 of the Covenant requires that no

¹³ See, for example, communications No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011, para. 8.3.

restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed (a) in conformity with the law and (b) which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

9.4 In the present case, the Committee notes that article 19 of the Covenant is applicable because the restrictions on the authors' right to freedom of assembly were closely linked to the subject matter of the meeting for which they had sought an authorization. The Committee further notes the State party's assertion that the restrictions were in accordance with the Law on Mass Events and the decision of the Baranovichi City Executive Committee No. 4. General comment No. 34, although referring to article 19 of the Covenant, also provides guidance with regard to elements of article 21 of the Covenant. The Committee observes that the State party has failed to demonstrate, despite having been given an opportunity to do so, why the restrictions imposed on the authors' rights of freedom of expression and assembly, even if based on a law and a municipal decision, were necessary, for one of the legitimate purposes of article 19, paragraph 3, and the second sentence of article 21 of the Covenant. Accordingly, the Committee concludes that the facts as submitted reveal a violation, by the State party, of the authors' rights under articles 19 and 21 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Belarus of articles 19 and 21 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including reimbursement of the legal costs incurred by them and compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Law on Mass Events, and its application, to ensure its conformity with the requirements of articles 19 and 21 of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**N. Communication No. 1791/2008, *Boudjemai v. Algeria*
(Views adopted on 22 March 2013, 107th session)***

<i>Submitted by:</i>	Hafsa Boudjemai (represented by TRIAL – Track Impunity Always)
<i>Alleged victims:</i>	Djaafar Sahbi (son of the author) and the author herself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	26 May 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and the right to an effective remedy, unlawful interference with the home
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16 and 17
<i>Article of the Optional Protocol:</i>	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2013,

Having concluded its consideration of communication No. 1791/2008, submitted to the Human Rights Committee by Hafsa Boudjemai under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Two individual opinions are appended to these Views, an individual opinion (partially dissenting) of Mr. Rodríguez-Rescia and an individual opinion (concurring) of Mr. Salvioli.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not participate in the consideration of the communication.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, which is dated 26 May 2008, is Hafsa Boudjemai, a widow, who claims that her son, Djaafar Sahbi, was the victim of violations by Algeria of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16 and 17 (para. 1) of the International Covenant on Civil and Political Rights. The author claims that she herself is the victim of violations of articles 2 (para. 3), 7 and 17 (para. 1) of the Covenant. She is represented by the Swiss anti-impunity organization TRIAL (Track Impunity Always).

1.2 On 6 June 2008, in accordance with rule 92 of its rules of procedure, the Committee, through its Special Rapporteur on new communications and interim measures, asked the State party not to take any measure that might hinder the exercise by the author and her family of their right to submit an individual complaint to the Committee. Accordingly, the State party was requested not to invoke its national legislation, and specifically Ordinance No. 06-01 of 27 February 2006 concerning the implementation of the Charter for Peace and National Reconciliation, against the author and the members of her family.

1.3 On 12 March 2009, the Committee, through its Special Rapporteur on New Communications and Interim Measures, decided not to examine the admissibility of the communication separately from the merits.

The facts as presented by the author

2.1 On the morning of 3 July 1995, Djaafar Sahbi accompanied one of his daughters, who was 8 years old, to a doctor's appointment at Mustapha Bacha university hospital (Algiers), where he was employed. As he left the hospital with his daughter at around 10 o'clock in the morning, he was ordered to follow two police officers wearing blue vests bearing the word "Police" (in Arabic). He and his daughter were ushered into a car. The victim's daughter was later taken to her father's office in the hospital, and Djaafar Sahbi's co-workers were instructed to accompany her home.

2.2 On 6 July 1995, police officers entered the Sahbi family home when no family members were present. The police broke down the steel door and the interior door of the house, as well as the doors of the bedrooms and closets. They seized Djaafar Sahbi's bag, his family record book and other documents.

2.3 None of the members of his family have seen Djaafar Sahbi or received any news of him since his arrest. In 2007, the security services officially recognized his disappearance but did not accept any responsibility for it. The author provides a copy of the "certificate of disappearance in the context of the national tragedy" issued by the Directorate-General of National Security in Constantine, Ministry of the Interior and Local Authorities, on 12 March 2007.

2.4 In the days following Djaafar Sahbi's arrest, the victim's family, and in particular his brother Youcef Sahbi, engaged in fruitless searches at numerous police stations and looked in vain for him at various prisons. No member of his family has seen him or been able to locate or make contact with him since he was arrested.

2.5 The victim's brother also contacted various judicial, governmental and administrative authorities, but to no avail. On 25 August 1996, he therefore referred the matter to the prosecutor of the Court of El Harrach, the chief prosecutor of the Court of Algiers, the Minister of Justice and the President of the Republic. At no time did any of these authorities conduct an investigation or provide an explanation as to the fate of Djaafar Sahbi.

2.6 The victim's family also sought recourse from the Working Group on Enforced or Involuntary Disappearances of the United Nations. His case was submitted to that body on

19 October 1998. However, the State party, as in other cases of missing Algerian citizens, did not respond to requests for information from this special procedure.

2.7 The author contends that she no longer has the legal right to undertake judicial proceedings, as Ordinance No. 06-01 on implementation of the Charter for Peace and National Reconciliation, which was adopted by referendum on 29 September 2005, prohibits the taking of any legal action against members of the Algerian defence and security services.

The complaint

3.1 It is claimed that Djaafar Sahbi was the victim of an enforced disappearance on 3 July 1995. The author invokes article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

3.2 As a victim of enforced disappearance, Djaafar Sahbi was prevented from exercising his right to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family pursued all legal avenues to discover the truth about his fate, but nothing came of their efforts.

3.3 The author considered that, as nearly 13 years¹ had passed since her son's disappearance at a secret detention centre, the chances of finding him alive were very slim. Given his prolonged absence and the circumstances and context of his arrest, it seems likely that he died while in custody. Incommunicado detention entails a high risk of violation of the right to life. The threat posed by enforced disappearance to the victim's life constitutes a violation of article 6 of the Covenant insofar as the State has failed in its obligation to protect the fundamental right to life – all the more so since the State party has never made any effort to investigate the fate of the victim.

3.4 As regards the victim, merely being subjected to enforced disappearance constitutes inhuman or degrading treatment. The anguish and suffering caused by indefinite detention without contact with the family or the outside world constitutes treatment in breach of article 7 of the Covenant.

3.5 For the victim's mother — the author of the communication — the disappearance of her son has been a devastating, painful and agonizing ordeal and a violation of her rights under article 7 of the Covenant.

3.6 Djaafar Sahbi was arrested by two police officers who did not have a warrant and who did not inform him of the reasons for his arrest, in violation of article 9, paragraphs 1 and 2, of the Covenant. Furthermore, he was not brought promptly before a judge or other officer authorized by law to exercise judicial power. The time limit for being brought before a judge should not exceed a few days, and incommunicado detention may itself entail a violation of article 9, paragraph 3. As a victim of enforced disappearance, he was not physically able to appeal against the lawfulness of his detention, apply to a judge to obtain his release or even ask a third party to defend him in court, in violation of article 9, paragraph 4.

3.7 If it is established that he has been the victim of a violation of article 7, it cannot be argued that he was ever treated with humanity and with respect for the inherent dignity of the human person in accordance with article 10, paragraph 1, of the Covenant.

¹ It has now been 18 years since the victim's disappearance.

3.8 As the victim of an unacknowledged detention, the victim was also reduced to the status of a non-person, in violation of article 16 of the Covenant.

3.9 Lastly, the sole purpose of the house search and the accompanying destruction of property was to harass the victim and his family. There has thus been a violation of article 17, paragraph 1, of the Covenant, with regard to Djaafar Sahbi and his mother.

State party's observations on admissibility

4.1 On 29 May 2009, the State party contested the admissibility of the communication. It is of the view that this communication, which incriminates public officials or other persons acting on behalf of public authorities in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be examined taking “a comprehensive approach” and should be declared inadmissible. The State party considers that such communications should be placed in the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at provoking the “collapse of the Republican State”. In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.2 The State party emphasizes that in some areas where there was a proliferation of informal settlements, civilians had trouble distinguishing the actions of terrorist groups from those of the security forces, to which they often attributed enforced disappearances. According to the State party, a large number of enforced disappearances must be considered in this perspective. The concept of disappearance in Algeria during the period in question actually covers six distinct scenarios. The first scenario concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and asked their families to report that they had been arrested by the security services, as a way of “covering their tracks” and avoiding being “harassed” by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the “national tragedy” would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the

victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the competent courts of justice. The State party observes that, as may be seen from the author's complaint, she has written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages in criminal proceedings by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the author to institute criminal proceedings and compel the investigating judge to launch an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed she did not need to bring the matter before the relevant courts, because of her presumption of the latter's likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to her. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.²

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy".

² The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the “national tragedy”. Lastly, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the “national tragedy”, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria’s defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of funds to compensate all victims of the “national tragedy”, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author’s allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on admissibility

5.1 On 6 October 2010, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not submit any complaints or requests for information through channels that would have allowed consideration of the case by the Algerian judicial authorities.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success

or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the author to submit her allegations to examination has prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

Author’s comments on the State party’s submission

6.1 On 30 September 2011, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits.

6.2 The author points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention, the author considers that the State party’s adoption of domestic legislative and administrative measures to support the victims of the “national tragedy” cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol.³ In theory, such measures may well have an impact on the settlement of a dispute, but they must be studied with regard to the merits of the case and not to its admissibility. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.⁴

6.3 The author recalls that Algeria’s declaration of a state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant only during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The author therefore considers that the State party’s observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.4 The author again refers to the State party’s argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with article 72 et seq. (paras. 25 ff.) of the Code

³ Article 27 of the Vienna Convention on the Law of Treaties states that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

⁴ The author refers to the concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, CCPR/C/DZA/CO/3, adopted on 1 November 2007, paras. 7, 8 and 13. The author also refers to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author further refers to the concluding observations of the Committee against Torture concerning the third periodic report of Algeria, CAT/C/DZA/CO/3, adopted on 13 May 2008, paras. 11, 13 and 17. Lastly, the author refers to general comment No. 29 on article 4 (derogations during a state of emergency), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40), annex VI, para. 1.

of Criminal Procedure. She refers to the Committee's recent jurisprudence in the *Benaziza* case, in which it stated in its Views adopted on 27 July 2010 that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor."⁵ The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though members of Djaafar Sahbi's family attempted, from the date of his arrest by Algerian police officers on 3 July 1995, to make enquiries concerning his whereabouts, but to no avail.

6.5 In the days that followed, Djaafar Sahbi's brother, Youcef Sahbi, carried out a fruitless search at numerous police stations. In addition, the family contacted the directors of the Berrouaghia, El Harrach and Serkakji prisons. On 25 August 1996, Djaafar Sahbi's brother referred the matter to the prosecutor of the Court of El Harrach, the chief prosecutor of the Court of Algiers, the Minister of Justice and the President of the Republic. At no time did any of these authorities ever conduct an investigation into the alleged violations. Consequently, the author and her family cannot be reproached for not having exhausted all domestic remedies since it was the State party that failed to carry out the necessary investigations incumbent upon it.

6.6 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between DA 250,000 and DA 500,000. The State party has therefore neither convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the ordinance, nor how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and her son would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned ordinance, has led to the effective prosecution of the perpetrators of human rights violations in similar circumstances. The author concludes that the remedies mentioned by the State party are futile.

6.7 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which the victims of the "national tragedy", in general, might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact the same comments have been put forward in a number of other cases, which shows the State party's continuing unwillingness to consider such cases individually.

6.8 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure, which permits the Working Group or Special Rapporteur to decide, because of the exceptional nature of the case, to request a written reply relating exclusively to the question of admissibility. Consequently, it is not for

⁵ Communication No. 1588/2007, *Benaziza v. Algeria*, para. 8.3.

the author of the communication or the State party to take such decisions, which are the sole prerogative of the Working Group or Special Rapporteur. The author considers that the present case is no different from other cases of enforced disappearance, and that admissibility should not be considered separately from the merits.

6.9 Lastly, the author notes that the State party has not submitted observations on the merits. In the absence of such observations from the State party, the Committee must base its decision on existing information. The allegations made by the author in her communication are corroborated and substantiated by numerous reports on the security forces' actions at the time and by the author's own persistent efforts and those of her family. In view of the State party's involvement in the disappearance of her son, the author is unable to provide additional information in support of her communication, as that information is entirely in the hands of the State party. The author also notes that the lack of any submission from the State party regarding the merits of the case is tantamount to the State party's acknowledgement that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 The Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.3 above) does not preclude their being considered separately by the Committee. The joinder of admissibility and merits does not mean they must be examined simultaneously. Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Djaafar Sahbi was reported to the Working Group on Enforced or Involuntary Disappearances on 19 October 1998. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.⁶ Accordingly, the Committee considers that the examination of Djaafar Sahbi's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author and her family have not exhausted domestic remedies, since they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author has written letters to political and administrative authorities and has petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it

⁶ See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 7.2; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and communication No. 540/1993, *Laureano Atachahua v. Peru*, Views adopted on 25 March 1996, para. 7.1.

through to its conclusion by availing herself of all available remedies of appeal and judicial review. The Committee also takes note of the author's argument that, on 25 August 1996, the victim's brother petitioned the prosecutor of the Court of El Harrach, the chief prosecutor of the Court of Algiers, the Minister of Justice and the President of the Republic. At no time did any of these authorities conduct an investigation into the alleged violations. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.⁷ Although Djaafar Sahbi's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 continues to be applied despite the Committee's recommendations that it should be brought into line with the Covenant.⁸ The Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.⁹ Moreover, given the vague wording of articles 45 and 46 of the ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable. The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee considers that, for a communication to be deemed admissible, the author must have exhausted only the remedies relevant to the alleged violation; in the present case, remedies with respect to enforced disappearance.

7.6 The Committee considers that the author has sufficiently substantiated her claims insofar as they raise issues under articles 6 (para. 1), 7, 9, 10, 16, 17 (para. 1) and 2 (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party submitted collective and general observations in response to serious allegations by the author, and has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances between 1993 and 1998 should be considered within the broader context of

⁷ See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, para. 7.4; communication No. 1781/2008, *Berzig v. Algeria*, para. 7.4; and communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

⁸ Concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

⁹ Communication No. 1779/2008, *Mezine v. Algeria*, para. 7.4; communication No. 1588/2007, *Benaziza v. Algeria*, para. 8.3; communication No. 1781/2008, *Berzig v. Algeria*, para. 7.4; and communication No. 1905/2009, *Khirani v. Algeria*, para. 6.4.

the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee recalls its jurisprudence, according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the dignity inherent in every human being. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence¹⁰ according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.¹¹ In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, her son, Djaafar Sahbi, was arrested on 3 July 1995 at around 10 o'clock in the morning by two uniformed police officers at the exit of the hospital where he worked, and the victim's daughter was present at the time of his arrest. It further notes that, according to the author, such a disappearance entails a high risk to the victim's right to life and that his prolonged absence and the circumstances and context of his arrest lead to the conclusion that it seems likely that he died while in custody. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, effectively removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Djaafar Sahbi's life. Therefore the Committee concludes that the State party has failed in its duty to protect Djaafar Sahbi's life, in violation of article 6, paragraph 1, of the Covenant.¹²

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on article 7,¹³ which recommends that States parties should make provision to ban incommunicado detention. It notes in the present case that Djaafar Sahbi was arrested by the police on 3 July 1995 and that his fate is still unknown. In the absence of a satisfactory

¹⁰ See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, para. 8.3; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; and communication No. 1781/2008, *Berzig v. Algeria*, para. 8.3.

¹¹ See communication No. 1779/2008, *Mezine v. Algeria*, para. 8.3; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

¹² See communication No. 1779/2008, *Mezine v. Algeria*, para. 8.4.

¹³ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Djaafar Sahbi.¹⁴

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of Djaafar Sahbi. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to her.¹⁵

8.7 With regard to the alleged violation of article 9, the Committee notes the author's claim that Djaafar Sahbi was arrested on 3 July 1995 by two uniformed police officers; that he was not charged and was not brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention; and that no official information was given to his family regarding Djaafar Sahbi's whereabouts or his fate, despite the fact that the authorities certified that his disappearance had occurred "in the context of the national tragedy".¹⁶ In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with regard to Djaafar Sahbi.¹⁷

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Djaafar Sahbi's incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.¹⁸

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.¹⁹ In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate or whereabouts of Djaafar Sahbi, despite the multiple requests addressed by the author to the State party. The

¹⁴ See communication No. 1779/2008, *Mezine v. Algeria*, para. 8.5; communication No. 1905/2009, *Khirani v. Algeria*, para. 7.5; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.5; communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

¹⁵ See communication No. 1779/2008, *Mezine v. Algeria*, para. 8.6; communication No. 1905/2009, *Khirani v. Algeria*, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.6; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, para. 7.5; and communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.11.

¹⁶ See paragraph 2.3 above.

¹⁷ See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, para. 8.7; communication No. 1905/2009, *Khirani v. Algeria*, para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, para. 8.7.

¹⁸ See general comment No. 21 (1992) on article 10, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40, annex VI, sect. B, para. 3*; and communication No. 1779/2008, *Mezine v. Algeria*, para. 8.8; communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

¹⁹ See communication No. 1779/2008, *Mezine v. Algeria*, para. 8.9; communication No. 1905/2009, *Khirani v. Algeria*, para. 7.9; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.9; communication No. 1780/2008, *Zarzi v. Algeria*, para. 7.9; communication No. 1588/2007, *Benaziza v. Algeria*, para. 9.8; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

Committee concludes that Djaafar Sahbi's enforced disappearance nearly 18 years ago denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 With regard to the alleged violation of article 17, the Committee notes that the State party did not provide any justification or clarification as to the entry of officials into the Sahbi family home without a warrant and when no member of the family was present, and as to their confiscation of important personal documents belonging to Djaafar Sahbi, such as his family record book. The Committee concludes that the entry of officials into the Sahbi family home in such circumstances constitutes unlawful interference with their home, in violation of article 17 of the Covenant.²⁰

8.11 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004),²¹ in which it indicates in particular that the failure by a State party to investigate allegations of violations may in itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities regarding Djaafar Sahbi's disappearance, including the prosecutor of the Court of El Harrach and the chief prosecutor of the Court of Algiers on 25 August 1996, all their efforts led to nothing, and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Djaafar Sahbi, the author and her family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.²² The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, with regard to Djaafar Sahbi, and of article 2 (para. 3), read in conjunction with articles 7 and 17 of the Covenant, with regard to the author.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant and of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, with regard to Djaafar Sahbi. The information also discloses a violation of articles 7 and 17 and of article 2 (para. 3), read in conjunction with articles 7 and 17 of the Covenant, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and her family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Djaafar Sahbi; (b) providing the author and her family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Djaafar Sahbi is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Djaafar

²⁰ Communication No. 1779/2008, *Mezine v. Algeria*, para. 8.10.

²¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

²² CCPR/C/DZA/CO/3, para. 7.

Sahbi, if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there was a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion (partially dissenting) of Mr. Víctor Manuel Rodríguez Rescia

1. This individual opinion relates to the decision of the Human Rights Committee on communication No. 1791. I support the Committee's findings of a violation of the rights established in articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17, and in article 2 (para. 3) read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, in respect of Djaafar Sahbi, and in articles 7, 17 and 2 (para. 3) read in conjunction with articles 7 and 17 of the Covenant, in respect of the author.

2. However, I only partially agree with the Committee in connection with its decision regarding the effects of Ordinance No. 06-01 of 27 February 2006 — and notably article 45 — promulgating the Charter for Peace and National Reconciliation, and its application. The ordinance was approved by referendum on 29 September 2005 and prohibits any legal action against members of the Algerian defence and security services for such offences as torture, extrajudicial killings and enforced disappearance. Under this ordinance anyone making a complaint or allegation of this kind is liable to a penalty of 3 to 5 years' imprisonment and a fine of 250,000 to 500,000 Algerian dinars.

3. The existence per se of the part of this ordinance that allows anyone making allegations of this kind to be sentenced to imprisonment and a fine is contrary to the International Covenant on Civil and Political Rights because it establishes a framework of impunity for those who commit serious human rights violations, including situations of enforced disappearance such as that of Djaafar Sahbi, whose whereabouts are still unknown today, allowing them to avoid prosecution, penalties and the need to provide compensation.

4. It is true that the Committee found that the application of the ordinance provides for some redress. However, the measures it recommends to ensure that the ordinance will not be applied in similar cases in the future, are insufficient. The Committee has issued a general statement that the State should not impede "enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances" and should "take steps to prevent similar violations in the future" (para. 10). I believe that the Committee should have stated clearly and directly that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killing and enforced disappearance of persons is a violation of the general obligation under article 2, paragraph 2, of the Covenant, according to which the State party must, "where not already provided for by existing legislative or other measures, ... take the necessary steps, in accordance with its constitutional processes and with the provisions of the ... Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

5. For the undersigned, the relevant part of the ordinance has *erga omnes* effects and sends a message of impunity that prevents the victims of serious offences of this kind, and their families, from exercising their right to an effective legal remedy, to know the truth, to assert their human right to justice and petition and to obtain full reparation. Even acknowledging the positive contribution of the remaining provisions of Ordinance No. 06-01 to an agreement on peace and national reconciliation in Algeria, this should not be at the expense of the fundamental human rights of the victims and their families who have suffered the consequences of serious offences; still less should such persons be liable to penalties and sanctions that victimize them once again for exercising their right to invoke a legal remedy — one of the very remedies, in fact, that are supposed to guarantee and protect

those human rights that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

6. The author, referring to the relevant provisions of Ordinance No. 06-01, has explicitly stated that “the legislative measures adopted amount to a violation of the rights enshrined in the Covenant” (para. 6.2, final sentence). The undersigned is in full agreement with the author; that opinion is also consistent with previous decisions of the Committee (concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, CCPR/C/DZA/CO/3, adopted on 1 November 2007, paras. 7, 8 and 13; it is also in line with communications Nos. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2, and 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11).

7. The fact that recourse to the courts is legally impossible since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Djaafar Sahbi, the author and the family of all access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, applications to the courts to cast light on the most serious of offences, such as enforced disappearance. Based on the Committee’s finding that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, in respect of Djaafar Sahbi, and of article 2, paragraph 3, read in conjunction with articles 7 and 17 of the Covenant, in respect of the author, the Committee ought to have stated explicitly that, in accordance with its international obligation to bring its national legislation into line with the protection provisions of the Covenant, the State party should comply with the provisions of article 2, paragraph 2, by taking legislative or other measures to suspend or abrogate the impediments, penalties, sanctions and any other obstacle liable to create impunity for serious offences such as enforced disappearance of persons, torture and extrajudicial killing, not only for the victims referred to in this communication but also for victims and families in similar cases.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion (concurring) of Committee member Mr. Fabián Omar Salvioli

1. I agree with the Committee's decision in this case (communication No. 1791/2008, *Boudjemai v. Algeria*) but in my opinion the Committee's reasoning on the application of article 2 of the International Covenant on Civil and Political Rights is not correct, and indeed warrants thorough debate. In the Sahbi case the Committee should have found that the State party was in breach of article 2, paragraph 2, of the Covenant. It is also my view that the Committee should have stated that, in its opinion, the State party should amend articles 45 and 46 of Ordinance No. 06-01 in order to guarantee that such incidents do not occur again.

2. The Committee must apply the law to the proven facts regardless of the particular legal claims made by the parties. This is not a matter of discretion, but something it must do in order to properly carry out its task in accordance with the principle of *iura novit curia*. I have already stated my position in this regard and refer to my legal arguments and grounds so as not to repeat them here.^a

3. The Committee has hitherto maintained that it is not possible for it to find a separate violation of article 2 of the Covenant in an individual communication. However, even if that were the case — which is debatable — the Committee has on hundreds of occasions, including in its Views on the present case, found a violation of article 2, paragraph 3, in connection with, or read in conjunction with, other articles of the Covenant.

4. Why can the same logic not be applied to article 2, paragraph 2, of the Covenant? The Committee insists on not looking at article 2, paragraph 2, when considering individual communications, without citing any reasonable grounds for such a position.

5. Under article 2, paragraph 2, of the Covenant, "Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Obviously, if a State party adopts a rule at variance with this provision, it is violating the provision.

6. The author in this case states in no uncertain terms that no recourse to justice was possible owing to the existence of Ordinance No. 06-01 (Views, paras. 2.7 and 6.6). According to articles 45 and 46 of that ordinance, in cases of enforced disappearance such as this one, legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces, and any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between 250,000 and 500,000 Algerian dinars.

7. In individual opinions in other similar cases involving Algeria, I have explained the reasons why the Committee ought to address the incompatibility of Ordinance No. 06-01 with the Covenant in light of article 2, paragraph 2, and why its application to the victims is a violation of that provision of the Covenant in each particular case.^b My arguments apply in this case too: in this communication, the Committee is fully empowered to set the legal

^a *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005; Views adopted on 17 March 2009; partially dissenting opinion of Committee member Mr. Fabián Omar Salvioli, paras. 3–5.

^b Human Rights Committee, *Chihoub v. Algeria*, communication No. 1811/2008; Views adopted on 31 October 2011; individual opinion (concurring) of Committee member Mr. Fabián Omar Salvioli, joined by Mr. Cornelis Flinterman, paras. 5–10.

framework for consideration of the facts before it, as on 27 February 2006 the State party adopted Ordinance No. 06-01, prohibiting all recourse to the courts to shed light on the most serious offences such as enforced disappearance; the effect of this ordinance is to provide impunity for serious human rights violations, and the author, Hafsa Boudjemai, complains that she was unable to take legal action because of it.

8. In enacting this legislation, the State party adopted a provision that runs counter to the obligation established in article 2, paragraph 2, of the Covenant. That in itself is a violation that the Committee should have mentioned in its decision.

9. Even if the Committee believes that a violation of article 2 can be found only in connection with another provision of the Covenant, the finding in this case should have been a violation of article 2, paragraph 2, in connection with, or read in conjunction with, articles 6, 7, 9, 10 and 16 of the Covenant.

10. Consequently, the Committee should have established that, as reparation, Ordinance No. 06-01 should be made to comply with the international obligations of the State party through the amendment of articles 45 and 46, which are inherently incompatible with the Covenant.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**O. Communication No. 1803/2008, *Bulgakov v. Ukraine*
(Views adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	Dmitriy Vladimirovich Bulgakov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	23 May 2008 (initial submission)
<i>Subject matter:</i>	Spelling of author's name according to Ukrainian orthography in identity documents
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Arbitrary and unlawful interference with private life; prohibition of discrimination; protection of minorities
<i>Articles of the Covenant:</i>	17, 26 and 27
<i>Article of the Optional Protocol:</i>	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2012,

Having concluded its consideration of communication No. 1803/2008, submitted to the Human Rights Committee by Dmitriy Vladimirovich Bulgakov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Dmitriy Vladimirovich Bulgakov, a Ukrainian citizen of Russian origin, born in 1974. He claims to be a victim of violations by Ukraine of his rights under articles 17, 26 and 27 of the International Covenant on Civil and Political Rights. The Covenant and Optional Protocol to the Covenant entered into force for Ukraine on 23 March 1976 and 25 October 1991, respectively. The author is unrepresented.

The facts as presented by the author

2.1 The author was born in the former Byelorussian Soviet Socialist Republic (one of the republics of the former Soviet Union). Since 1986 he has lived in the Autonomous

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Republic of Crimea (Ukraine). On 21 September 1990, he received his first Soviet passport, issued in Russian and Ukrainian, in which his name was transcribed as “Дмитрій Владімірович” (Dmitriy Vladimirovich).

2.2 On 24 August 1991, the date of declaration of independence of Ukraine, the author became a Ukrainian citizen. Subsequently, in the internal and external passports¹ issued to him in 1997 and 1998, respectively, his name and patronymic were changed, against his will, from “Дмитрій Владімірович” (Dmitriy Vladimirovich) to “Дмитро Володимирович” (Dmytro Volodymyrovych). According to the author, this constituted a violation of his right to integrity of his given name and patronymic and an unjustified interference with his right to respect for his private and family life, in violation of article 17 of the Covenant.

2.3 On an unspecified date, the author submitted appeals to the Passport Service of the Kiev District Department of the Simferopol City Board and to the Main Board of the Ministry of Internal Affairs of Ukraine in Crimea, asking that his given name and patronymic be restored to their original phonetic form in his identity documents. Those appeals were dismissed on 30 April 1999 and 15 May 2000, respectively. Further, on 14 July 1998 (regarding the external passport) and 13 June 2000 (regarding the internal passport), the author filed complaints before the Kiev District Court, asking that his given name and patronymic be restored to their original phonetic form. Both claims were dismissed, on 16 August 1999 (regarding the external passport) and on 7 August 2000 (regarding the internal passport). He appealed the first instance decisions before the Supreme Court of Crimea, but both appeals were dismissed, on 2 February 2000 and 30 August 2000, respectively.

2.4 On 21 July 2000, the author lodged an application (No. 59894/00) with the European Court of Human Rights for alleged violation of articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 11 September 2007, the Court dismissed his claims.

2.5 On 25 September 2007, the author lodged an application with the Civil Status Registration Department of the Kiev District of Simferopol, requesting to change his given name and patronymic, according to a specific procedure for changes of names, mentioned by the European Court of Human Rights in its judgment. However, on 14 November 2007, this application was also dismissed by the Civil Status Registration Department, and the latter in its reply underlined that the procedure for examining applications for name changes was not applicable to the author’s situation. The author maintains that he has exhausted all available domestic remedies.

The complaint

3.1 With regard to article 17 of the Covenant, the author claims that, by unilaterally changing his given name and patronymic and by precluding him from restoring their original phonetic form in his identity documents, the State party violated his natural right to preserve his name and violated article 17 of the Covenant, i.e. his right to respect for family and private life. He further claims that the State party’s domestic courts did not provide any justification as to why the “Ukrainianization” of his names would be necessary to protect the rights and freedoms of others and therefore the interference with his right to private and family life did not pursue a legitimate aim. He also submits that the change of his names resulted in numerous misunderstandings, since the Ukrainian pronunciation of his names

¹ Two types of passports are issued by the Ukrainian authorities, commonly known as the internal passport (the main domestic identification document) and external/international passport for international travel.

sounded “rough and ridiculous” in Russian and he was often subjected to “mockeries” by Russian-speaking fellow citizens in Crimea, where there were “anti-Ukrainian sentiments”.

3.2 In this connection, the author draws attention to the fact that a law that would provide for the change of original names into Ukrainian names does not exist in the State party. On the contrary, the Council of Europe Framework Convention for the Protection of National Minorities of 1 February 1995 (ratified by Ukraine on 26 January 1998), the Ukrainian Law on Languages of 28 October 1989, the Law on National Minorities of 25 June 1992 and the Civil Code of Ukraine of 16 January 2003 all provide for the spelling and the use of the original names of citizens of Ukraine in their respective original phonetic form.

3.3 In this context, the author contends that the practice of the “Ukrainianization” of the given names of individuals belonging to the two other nations of the Eastern Slavic group (Russians and Belarusians) cannot be imposed on individuals against their will, since it contradicts national laws. He maintains that the Ukrainian authorities implement such a practice, which, according to the author, is aimed at the assimilation of the Russian national minority in Ukraine.

3.4 The author notes that while the Russian minority in Ukraine constitutes about 40 per cent of the total population of Ukraine, Russians constitute around 70 per cent of the Crimean peninsula’s total population. Moreover, Crimea is an autonomous republic within the State party. Article 11 of the Constitution of the Autonomous Republic of Crimea provides that in the Autonomous Republic of Crimea official documents certifying the status of a citizen shall be issued in both Ukrainian and Russian. However, all official documents issued by the authorities to the author are in the Ukrainian language only. The author maintains, with regard to article 27 of the Covenant, that since the original name of a person is an essential element of his or her ethnic, cultural and linguistic identity, Ukrainian authorities violated his right to enjoy his own culture and use his own language.

3.5 The author considers himself a victim of discrimination prohibited under article 26 of the Covenant read together with article 17, based on his national origin. He claims that the fact that only the given names and patronymics of Russian origin are subject to “Ukrainianization” and that the domestic courts and other Ukrainian bodies dismissed his request to restore his given name and patronymic to their original phonetic form implies that only individuals of Russian origin are deprived of the possibility to preserve their original given names and patronymics.

State party’s observations

4.1 On 10 February 2009, the State party reiterated the facts relating to the issuance of the author’s identity documents and his attempts to revert to his original names through the courts. The State party further submits that the author complained to the European Court of Human Rights regarding violations of his rights under articles 8 and 14 of the European Convention on Human Rights and that his application was rejected with the following motivation. Firstly, the procedure foreseen by the Ukrainian legislation for changing one’s name was not particularly complicated, with no excessive burden placed on the author, but the latter never used this procedure. The refusal of the domestic courts to order the issuing of new passports reflecting a particular form and spelling of the applicant’s name, when he could have sought its change under the specific procedure, could not “be deemed to have been unreasonable or arbitrary”. Accordingly, the Court found no violation of article 8 of the Convention. Secondly, the Court considered that there existed differences regarding the translation of certain names, which, however, were not related to the ethnic origin of the individual. The Court recognized the right of the Contracting State to establish a rule, in accordance with the longstanding and generally accepted tradition of using two different forms of the same name in Russian and Ukrainian, which rule applied in the absence of any clearly expressed wish of the person concerned to the contrary. The Court also noted that it had not been shown that the author could not obtain a departure from that rule if he were to

follow the procedure for a change of name. Accordingly, the Court found no violation of article 14 of the Convention.

4.2 The State party submits that, on 25 September 2007, the author submitted to the Civil Status Registration Department of the Kiev District of Simferopol a request to change his given name and patronymic. On 9 October 2007, his request was rejected, with the explanation that the Procedure for Considering Applications for Change of Name of a Natural Person, approved by Ordinance No. 915 of the Council of Ministers of 11 November 2007, does not foresee the registration of the change of name and patronymic with indication of particular transcription, and he was recommended to make a notarized translation (with transcription) of the names contained in his birth certificate. Rather than filing a second application to the Civil Status Registration Department supplementing it with the above notarized translation, the author proceeded to file a request for a new passport with the Department of Citizenship, Immigration and Registration of Natural Persons of the Kiev District Department of the Simferopol Division of the Ministry of the Interior. The latter rejected his request on 14 November 2007, stating that a birth certificate can be used by citizens as the basis for the issuance of a passport only when they first reach the age of 16. The State party maintains that the author was supposed to file a second request for name change to the Civil Status Registration Department and apply for a passport after being issued a certificate for a name change, based on Ordinance No. 915.

4.3 In addition, the State party submits that in the Eastern Slavic countries (Ukraine, Belarus and the Russian Federation), in accordance with the established practice, names and patronymics, when translated from one language into another, are not transcribed but are “replaced by the corresponding, historically established, equivalent”. The rules for that replacement are reflected in the Ukrainian grammar book *Ukrainian Spelling*. The State party states that the above rules were also applicable in 1990.

Author’s comments on the State party’s observations

5.1 On 14 April 2009, the author submitted that on 25 September 2007, he had indeed filed a request with the Civil Status Registration Department of the Kiev District of Simferopol to change his given name and patronymic. On 9 October 2007, his request was rejected, with the explanation that the Procedure for Considering Applications for Change of Name of a Natural Person, approved by Ordinance No. 915 of the Council of Ministers of 11 November 2007, does not foresee the registration of the change of name and patronymic with indication of particular transcription. It was recommended he use the procedure provided for under article 294 of the Civil Code of Ukraine,² and make a notarized translation (with transcription) of the names contained in his birth certificate.

5.2 On 16 October 2007, the author obtained a notarized translation (with transcription) of the names contained in his birth certificate. He submits that, according to point 16 of the Regulation Regarding the Passport of the Ukrainian Citizen, approved by the Supreme Council of Ukraine on 2 September 1993: “A replacement of a passport shall be effectuated in case of: 1. Change in the family name, the patronymic or the name; 2. Establishment of a discrepancy in the records; 3. Unsuitability for usage.”³ On 18 October 2007, the author

² Article 294 of the Ukraine Civil Code reads as follows (unofficial translation):

Right to a Name

1. A natural person has the right to a name.
2. A natural person is entitled to a transcribed record of his first and last name in accordance with his/her national traditions.
3. In the case of distortion of a natural person’s name it must be corrected. If the distortion of the name was carried out in a document, such document is subject to replacement. [...]

³ Unofficial translation.

applied to the Head of the Department of Citizenship, Immigration and Registration of Natural Persons of the Kiev District Department of the Simferopol Division of the Ministry of Interior to replace his internal passport, taking into consideration the established discrepancies between his names in the birth certificate and the passport, based on point 16, paragraph 2, of the Regulation Regarding the Passport of the Ukrainian Citizen. On 14 November 2007, his application was rejected, with the explanation that they could only issue a passport based on the birth certificate when a person reached the age of 16. The author maintains that the above explanation contradicts the Ukrainian legislation, in particular because point 7 of the above Regulation reads: "In cases of replacement of passports of citizens, the latter should submit the passport, subject to replacement, and in cases [...] when discrepancies in the records are established, also [...] the documentation confirming the above circumstances."⁴ The author maintains that he should be able to apply for a replacement of his passport in case of discrepancy in the records and that he submitted, as documentation evidencing the discrepancy in the records, the official translation of his birth certificate. Further, article 294, paragraph 3, of the Civil Code prescribes that if the "distortion of the name was carried out in a document", such document must be replaced, and the author maintains that the internal passport issued to him was the first document, where his names were distorted.⁵

5.3 The author notes the State party's submission that he was supposed to file a second request for name change to the Civil Status Registration Department and apply for a passport after being issued a certificate for a name change based on Ordinance No. 915, but he submits that the rejection letter of 9 October 2007 did not contain any notification that he should follow such procedure. On the contrary, the letter explicitly stated that the Procedure for Considering Applications for Change of Name of a Natural Person did not foresee the registration of the change of name and patronymic with indication of particular transcription. Despite that, on 27 March 2009, wishing to settle the dispute, the author filed with the Civil Status Registration Department a second request to amend/restore his original names in his identity documents, accompanied with the certified translation of his birth certificate, in accordance with the State party's submission of 10 February 2009. The above request was once again rejected on 10 April 2009. He further submits that the domestic legislation of the State party does not appear to foresee a procedure suitable to remedy his situation, because all procedures are oriented towards correcting or amending an individual's birth certificate, but in his case the latter is the only document where his names are transcribed correctly. He submits that of the final decisions of all the courts that reviewed his complaints and appeals, none mentioned a procedure that the author could follow to correct his name and patronymic in his identity documents.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

⁴ Unofficial translation.

⁵ The author further makes references to cases similar to his, in which the national courts had ruled in favour of the applicants.

6.3 The Committee further notes the State party's submission that the author could have filed a second request for the name change with the Civil Status Registration Department and applied for a passport after being issued a certificate for a name change, based on Ordinance No. 915. The Committee, however, observes that the author attempted to use the above procedure in order to restore his original names, by filing on 27 March 2009 a second request to the Civil Status Registration Department and that the above request was once again rejected on 10 April 2009. The Committee accordingly finds that the remedy suggested by the State party was not an adequate mechanism for dealing with the author's allegations and concludes that the domestic remedies had been exhausted.

6.4 The Committee considers that the author's claims under articles 17, 26 and 27 of the Covenant are sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 Regarding the alleged violation of article 17, the Committee has taken note of the author's argument that the imposition of a Ukrainian spelling for his first name and patronymic in his identity documents resulted in him being subjected to frequent mockery and generated a feeling of deprivation and arbitrariness, since it sounded ridiculous to Russian speakers. The Committee recalls that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee further recalls that a person's surname constitutes an important component of one's identity, and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.⁶ The Committee notes the State party's submission that in Ukraine names and patronymics when translated from one language into another are not transcribed, but are "replaced by the corresponding, historically established, equivalent" and that the author's name was modified so as to comply with the Ukrainian naming tradition.

7.3 The Committee further observes that the legal basis for the modification of the author's name and patronymic remains unclear and that the State party has not disputed the author's claim that such modification actually violates the domestic laws of the State, and, therefore, finds that the interference at stake is unlawful. The Committee takes account of its previous jurisprudence,⁷ where it held that the protection offered by article 17 encompassed the right to choose and change one's own name and considered that that protection a fortiori protected persons from having a name change being imposed upon them by the State party. In this regard the Committee further observes that in the present case the State party went beyond transcribing the name and patronymic of the author and actually changed them on the basis of the rules contained in a Ukrainian grammar book. The Committee therefore considers that the State party's unilateral modification of the author's name and patronymic on official documents is not reasonable, and amounts to unlawful and arbitrary interference with his privacy, in violation of article 17 of the Covenant.

⁶ Communication No. 453/1991, *Coeriel and Aurik v. Netherlands*, para. 10.2.

⁷ Communication No. 1621/2007, *Raihan v. Latvia*, paras. 8.3–8.5.

7.4 Having found a violation of article 17, with respect to the unilateral change of the author's name and patronymic by the State party, the Committee decides not to examine separately the claims under articles 26 and 27 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 17 of the Covenant.

9. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Bulgakov with an effective remedy, including to restore the original phonetic form in his identity documents and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and have them translated into Ukrainian and widely disseminated in Ukrainian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**P. Communication No. 1804/2008, *Il Khwildy v. Libya*
(Views adopted on 1 November 2012, 106th session)***

<i>Submitted by:</i>	Khaled Il Khwildy (represented by Al-Karama for Human Rights and TRIAL)
<i>Alleged victims:</i>	Khaled Il Khwildy and Abdussalam Il Khwildy – the author and his brother
<i>State party:</i>	Libya
<i>Date of communication:</i>	3 July 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel, inhuman and degrading treatment; right to liberty and security; right to recognition as a person before the law; right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10, paragraph 1; 14; 16; and 17, paragraphs 1 and 2
<i>Article of the Optional Protocol:</i>	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2012,

Having concluded its consideration of communication No. 1804/2008, submitted to the Human Rights Committee by Khaled Il Khwildy under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 3 July 2008, is Khaled Il Khwildy, a Libyan national born in 1972, currently residing in Switzerland. He acts on his own behalf and on

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mme Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iualia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual (dissenting) opinion by Mr. Krister Thelin is attached to these views.

The text of an individual (concurring) opinion by Mr. Fabián Omar Salvioli is attached to these views.

behalf of his brother, Abdussalam II Khwildy, also a Libyan national. The author claims violations by Libya of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; article 14; article 16; and article 17, paragraphs 1 and 2, of the Covenant in respect of his brother and articles 2, paragraph 3, and 7 with regard to himself. He is jointly represented by the organizations Alkarama for Human Rights and TRIAL (Track Impunity Always). The Covenant and its Optional Protocol entered into force for Libya¹ on 15 August 1970 and 16 August 1989 respectively.

The facts as presented by the author

2.1 In 1996, the author fled Libya and obtained political asylum in Switzerland. In April 1998, the eldest brother of the II Khwildy family, Djemaa II Khwildy, was summarily and publicly executed in Benghazi. A few days later, officers of the Internal Security Agency forcibly entered the family home, ransacked it and proceeded to arrest all the males in the family, including children. They were all taken to Benghazi prison and detained for over a month, until the author's brother (Abdussalam II Khwildy) confessed to having acted alone in helping the author flee the country. They were all subjected to varying degrees of ill-treatment. Abdussalam II Khwildy was subjected to severe beatings and on one occasion one of his brothers witnessed him being viciously beaten until he was bleeding and severely injured.

2.2 The decision to keep Abdussalam II Khwildy in detention was made by members of the security forces, with no judicial control. He was told by a police official: "I know you have done nothing, but you are going to stay here for five years".

2.3 The author claims that, in July 1998, another of the brothers, Mohamed II Khwildy, who had been in hiding since the arrest of his father and brothers, was killed by security forces. Meanwhile, Abdussalam II Khwildy was held in secret detention. In January 1999 he was transferred to Abou Salim prison in Tripoli. He was detained there until May 2003, when he was released without ever having been brought before a judicial authority. Throughout his detention, Abdussalam II Khwildy was not allowed to be visited by or communicate with his family or a lawyer, and his whereabouts were kept a secret from his family.

2.4 Abdussalam II Khwildy was again arrested on 17 October 2004. After an unfair trial, conducted in complete disregard of his rights, on 7 August 2006, he was sentenced to two years' imprisonment for having aided the author in fleeing the country.

2.5 After serving his sentence, Abdussalam II Khwildy was due to be released on 17 October 2006. On 19 October 2006, he called his father to inform him that two days earlier he had been transferred from the Abou Slim prison to the El Istihara prison² and that he would probably be released without delay, pending completion of some documentation. After that day, his family heard no more about his fate or his whereabouts. The Libyan authorities did not respond to his family's requests for information until the Secretary of Prisons eventually confirmed that he was not in any other prison in the country. The security services denied still detaining him and refused to give any information other than that he had been released. In the light of the family's previous experiences with the security services they had every reason to fear for his life and physical and psychological integrity.

2.6 In May 2008, Abdussalam II Khwildy was permitted to call his family and informed them that he was in Abou Salim prison. He was then able to receive a 45-minute visit from his parents. No news had been heard from him before that date as the Libyan authorities

¹ Formerly known as Libyan Arab Jamahiriya.

² A facility for prisoners who had recently completed their sentences.

had sealed off outside contact with Abou Salim prison following an incident in 2006 where three prisoners died of starvation. Abdussalam II Khwildy remained in detention until he was released on 22 August 2011.³

2.7 Regarding exhaustion of domestic remedies, the author recalls the Committee's jurisprudence that it is only necessary to exhaust remedies which are effective and available. Therefore, due consideration should be given to the fact that, in practice, no such remedies existed in Libya for victims of politically motivated human rights violations. Any such recourse through the judicial system is rendered ineffective and unavailable by the lack of independence of the judiciary and a generalized fear of reprisals, as well as fears arising from the particular situation of the author and his family. There was no separation of powers in Libya and the system was based on exclusion of judicial supervision. The fact that the victim was tried in a special tribunal, as well as the prison officials' threat that his father would suffer the consequences of the author's political activity abroad show that the present case was considered by the authorities to be political in nature. Considering the severe actions taken against the family merely on the basis of their association with the author, it is clear that a formal accusation against the authorities would result in even more dire consequences. It is therefore submitted that the author is excused from exhausting judicial domestic remedies. As for other kind of remedies, the author notes that the family took whatever non-judicial steps were available to them, as they made repeated enquiries to the relevant authorities without success.

The complaint

3.1 The author claims that the State party violated Abdussalam II Khwildy's rights under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1-4; article 10, paragraph 1; article 14; article 16; and article 17, paragraphs 1 and 2, of the Covenant.

3.2 The author submits that any situation of unacknowledged and incommunicado detention, such as that suffered by the victim during his first detention and during his enforced disappearance between October 2006 and May 2008, is a failure by the State party to prevent violations of the right to life by security forces, because placing the detainee entirely at the mercy of detaining officials is a situation which lends itself to serious abuses and constitutes a grave threat to the detainee's life. It has previously therefore been the view of the Committee that unacknowledged detention entails a breach of article 6, even if the detainee's death is not actually caused thereby. The authorities are under a duty to protect a detainee's right to life and allowing an enforced disappearance is in itself a failure in this duty.

3.3 Article 7 has been violated as Abdussalam II Khwildy was subjected twice to enforced disappearance. His first disappearance was for the five-year period of his first detention, when he was held in a secret location by the State party who refused to disclose his whereabouts and denied him any communication with his family or a lawyer, as well as any judicial scrutiny of his detention. His second disappearance occurred after his second detention was supposed to have ended. For 20 months he was held without any protection from the legal system or contact with the outside world, as the only persons aware that he was even being detained were the detaining officials. The extreme psychological suffering which is invariably caused by indefinite incommunicado detention constitutes a violation of article 7. Furthermore, article 7 was violated because he was subjected to severe beatings during his first detention in order to extract confessions from him and other acts of torture during the nine months of his first disappearance. In this connection, article 10, paragraph

³ See paragraph 5 below. Abdussalam II Khwildy was released after the regime change in Libya.

1, was also violated, as Abdussalam II Khwildy was not treated with humanity and respect for his dignity.

3.4 The author also alleges violations of Abdussalam II Khwildy's rights not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law (art. 9, para. 1); his right to be informed, at the time of the arrest, of the reasons of his arrest and to be promptly informed of any charges against him (art. 9, para. 2); his right to be brought promptly before a judge and to be tried within a reasonable time or released (art. 9, para. 3); and his right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (art. 9, para. 4).

3.5 The author also claims that the criminal proceedings against Abdussalam II Khwildy violated various aspects of the right to a fair trial, in particular, those contained in articles 14, paragraphs 1 and 3 (b) and (c). His hearing was held before a special tribunal outside the regular justice system and which lacked independence, thus denying him equality before the courts; the hearings were not public; and not even the family members were allowed to attend. As regards paragraph 3, the author submits that Abdussalam II Khwildy was not represented by a lawyer of his own choosing but by a lawyer chosen for him by the court and with whom he was unable to communicate outside the courtroom. He was thus deprived of the possibility of properly preparing his defence, as he clearly could not have had adequate time and facilities to do so in such circumstances. Finally, his right to be tried without undue delay was violated, as he was held in custody for almost two years pending trial.

3.6 The author argues that Abdussalam II Khwildy's right to recognition as a person before the law was violated, due to his enforced disappearance, in violation of article 16 of the Covenant. As regards article 17, the author submits that the security forces' intrusion into Abdussalam II Khwildy's family home, as well as the State party's failure to provide a remedy for this, constitute breaches of paragraphs 1 and 2 of this provision.

3.7 The author also submits that Abdussalam II Khwildy is a victim of a violation of article 2, paragraph 3, as he was not able to obtain any redress in Libya for the violations committed against him. In addition, Libya did not comply with its duty to investigate, criminally prosecute, try and punish those responsible for the violations.

3.8 The author contends that he himself is a victim of violations of article 2, paragraph 3, and article 7 of the Covenant, as a result of stress and anguish in connection with his brother's successive disappearances and the lack of an effective remedy for these violations.

3.9 In addition, given the fact that the positive obligation to ensure rights guaranteed under the Covenant encompasses the obligation of providing effective remedies whenever a violation has occurred, the failure to take necessary measures to protect those rights established by articles 6, 7, 9, 10, 14, 16 and 17 amounts in itself to an autonomous violation of the said rights read in conjunction with article 2, paragraph 3.

State party's failure to cooperate

4. On 11 May 2009, 22 December 2009 and 24 August 2010, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the admissibility and/or substance of the author's claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the

absence of a reply from the State party, due weight must be given to those of the author's allegations that have been properly substantiated.⁴

Additional submissions by the author

5. On 29 April 2009, the author informed the Committee that Abdussalam Il Khwildy had been visited by his family twice, on 25 October 2008 and 11 March 2009. On 17 April 2012, the author submitted that Abdussalam Il Khwildy was released on 22 August 2011.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 With respect to the question of exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no information or observations on the admissibility or merits of the communication have been received from the State party. Given these circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the alleged violation of article 17, paragraphs 1 and 2, of the Covenant, the Committee considers that, in view of the limited information provided, the author's allegations have been insufficiently substantiated for purposes of admissibility. The Committee considers that the other allegations have been sufficiently substantiated and finds no reason to consider the rest of the communication inadmissible. The Committee thus proceeds to its consideration on the merits in respect of the claims made with respect to: (a) Abdussalam Il Khwildy, under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; article 14; article 16 of the Covenant; (b) the author himself, under article 2, paragraph 3; read in conjunction with article 7 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the failure of the State party to provide any information regarding the author's allegations and reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.⁵ It is implicit in article 4, paragraph 2, of the Optional

⁴ See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

⁵ See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.7; and communication No. 1297/2004, *Medjnoue v.*

Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations.

7.3 Regarding the alleged secret and incommunicado detention of Abdussalam II Khwildy, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which the Committee recommends that States parties should make provision against incommunicado detention. It notes that Abdussalam II Khwildy was kept in incommunicado detention in an undisclosed location during two distinct periods: between April 1998 and May 2003, and when he was due to be released after serving two-year sentence, from October 2006 to May 2008, when his family was finally informed of his whereabouts. During these periods, he was kept in isolation, tortured and prevented from any contact with family or legal counsel.

7.4 The Committee recalls its jurisprudence under which acts leading to enforced disappearances constitute a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). They may also constitute a violation or a grave threat to the right to life (art. 6).⁶

7.5 The Committee notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of Abdussalam II Khwildy. The Committee further notes from the information before it that Abdussalam II Khwildy was subjected to enforced disappearance from April 1998 to May 2003, and from October 2006 to May 2008. On the basis of the information at its disposal, the Committee considers that both of Abdussalam II Khwildy's enforced disappearances constitute a violation of article 7 of the Covenant.⁷

7.6 With regard to the author, the Committee notes the anguish and distress caused by the disappearance of his brother, Abdussalam II Khwildy. Recalling its jurisprudence, the Committee concludes that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.⁸

7.7 Regarding article 9, the information before the Committee shows that Abdussalam II Khwildy was twice arrested without a warrant by agents of the State party, and that he was held in incommunicado detention on each occasion, first for five years and, after that, for

Algeria, Views adopted on 14 July 2006, para. 8.3.

⁶ Communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, para. 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3.

⁷ See *El Awani v. Libyan Arab Jamahiriya*, para. 6.5; *El Hassy v. Libyan Arab Jamahiriya*, para. 6.2.

⁸ See communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; *El Hassy v. Libyan Arab Jamahiriya*, para. 6.11.

20 months, without access to defence counsel, without being informed of the grounds for his arrest and without being brought before a judicial authority. During these periods, Abdussalam II Khwildy was unable to challenge the legality of his detention or its arbitrary character. In the absence of any explanation from the State party, the Committee finds violations of article 9 of the Covenant with regard to the detention of Abdussalam II Khwildy.⁹

7.8 The Committee has taken note of the author's allegation that Abdussalam II Khwildy was subjected to acts of torture during his detention. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of Abdussalam II Khwildy in detention, the Committee concludes that the rights of Abdussalam II Khwildy under articles 7 and 10, paragraph 1, were violated.¹⁰

7.9 With respect to the author's complaint under article 14, the Committee notes, from the information before it, that on 7 August 2006 — almost 22 months after his second arrest — Abdussalam II Khwildy was sentenced to two years' imprisonment by a special tribunal. Although a lawyer was assigned to him by the judge, he was not able to meet with him outside the courtroom. All hearings were held in secret and even close relatives could not attend the court hearings. Based on the material before it and in the absence of information from the State party, the Committee concludes that the trial and sentencing of Abdussalam II Khwildy, in the circumstances described, disclose a violation of article 14, paragraphs 1 and 3 (b) and 3 (c), of the Covenant.

7.10 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant) have been systematically impeded.¹¹ In the present case, the State party authorities failed to provide Abdussalam II Khwildy's family with relevant information on his arrest and detention. The Committee finds that the enforced disappearance and incommunicado detention of Abdussalam II Khwildy deprived him of the protection of the law during that period, in violation of article 16 of the Covenant.

7.11 The author invokes article 2, paragraph 3, of the Covenant, which requires State parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to State parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant, in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

⁹ See *Medjnoune v. Algeria*, para. 8.5.

¹⁰ See communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; *El Abani v. Libyan Arab Jamahiriya*, para. 7.7; and *El Hassy v. Libyan Arab Jamahiriya*, para. 6.4.

¹¹ See *El Abani v. Libyan Arab Jamahiriya*, para. 7.9; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

In the present case, the information before the Committee indicates that Abdussalam II Khwildy did not have access to an effective remedy, leading the Committee to find a violation of article 2, paragraph 3, read in conjunction with articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 14, paragraphs 1 and 3 (b) and (c); and article 16 vis-à-vis Abdussalam II Khwildy.¹² The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7, with regard to the author.¹³

7.12 The Committee notes that on two occasions the author's brother was held by the State party's authorities for prolonged periods of time, at a location unknown to his family and without the possibility of communicating with the outside world. The Committee recalls that in cases of enforced disappearance the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, places such persons outside the protection of the law and puts their lives in substantial and ongoing danger for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it fulfilled its obligation to protect Abdussalam II Khwildy's life. Indeed, the Committee, through previous cases, is also aware that other persons held in circumstances such as those endured by the author's brother had been found to have been killed or failed to reappear alive. The Committee therefore concludes that the State party failed in its duty to protect Abdussalam II Khwildy's life, in violation of article 6, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations by the State party of articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 14, paragraphs 1 and 3 (b) and (c); and article 16 with regard to Abdussalam II Khwildy. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; and article 16 vis-à-vis Abdussalam II Khwildy. Lastly, the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including (a) a thorough and effective investigation into the disappearance of Abdussalam II Khwildy and any ill-treatment that he suffered in detention; (b) providing the author and Abdussalam II Khwildy with detailed information on the results of its investigations; (c) prosecuting, trying and punishing those responsible for the disappearance or other ill-treatment; and (d) appropriate compensation to the author and Abdussalam II Khwildy for the violations suffered. The State party is also under an obligation to take appropriate and sufficient measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give

¹² See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, para. 9.9.

¹³ See communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para 8.11.

effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual (dissenting) opinion of Mr. Krister Thelin

The majority has found a violation of article 6, paragraph 1, of the Covenant. I disagree. The Committee's reasoning should, in my view, in paragraph 7.12 read as follows:

“Having reached the above conclusions, and in view of the fact that Mr. Abdussalam Il Khwildy was alive upon release, the Committee will not examine separately the allegations under article 6 of the Covenant.”

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Concurring opinion of Committee member Mr. Fabián Salvioli

1. I concur with the decision of the Human Rights Committee in the case of *Il Khwildy v. Libya* (communication No. 1804/2008), in which the Human Rights Committee has found that the State has violated several of the rights set forth in the International Covenant on Civil and Political Rights, to the prejudice of the victims.
2. Differences emerged within the Committee as to how to deal with so-called “secret detentions” in the light of the Covenant. In my partly dissenting vote in the case of *Aboufaied v. Libya*, I took the opportunity to draw attention to the need to avoid introducing any further requirements, in addition to those that already exist, in order to establish the enforced disappearance of a person. On that occasion, I opposed taking considerations of time into account, and after an analysis of specific provisions at the international (Declaration on the Protection of All Persons from Enforced Disappearance and International Convention for the Protection of All Persons from Enforced Disappearance) and regional levels (Inter-American Convention on Forced Disappearance of Persons), I concluded by observing that “the time dimension, in the sense of requiring a minimum duration of detention, has no place in the categorization of enforced disappearance”.
3. In my opinion “secret detention” is a euphemism that covers actual enforced disappearances of persons, reprehensible practices that violate several of the rights set forth in the International Covenant on Civil and Political Rights.
4. A careful reading of the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance itself leaves no room for any other analysis; it stipulates that “no-one shall be held in secret detention”. This is consistent with the joint study on secret detention carried out by three prestigious extra-conventional mechanisms of the United Nations human rights system.
5. The joint study expressly states that “every instance of secret detention also amounts to a case of enforced disappearance” and furthermore that “since secret detention amounts to an enforced disappearance, if resorted to in a widespread or systematic manner, such aggravated form of enforced disappearance can reach the threshold of a crime against humanity”.
6. In its decision in the case at hand, *Il Khwildy*, the Human Rights Committee has rightly found that both of the secret detentions suffered by the victim were two enforced disappearances (para. 7.12) and concludes that this was a direct violation of article 6 of the Covenant.
7. However, in its views the Committee also notes that “indeed, the Committee through previous cases is also aware that other persons held in circumstances such as those endured by the author’s brother had been found to have been killed or failed to reappear alive”.
8. This finding by the Committee adds nothing to the case. Even in the absence of previous cases, this case of *Il Khwildy* should have been settled in exactly the same manner. It is the facts of the individual case that are examined in order to determine whether there have been violations of the Covenant, and in its arguments the Committee should be careful not to tread on treacherous ground that might lead it to adopt double standards in respect of enforced disappearance, which would be regrettable.
9. If a State practices a “secret detention” it carries out an enforced disappearance; this is regardless of whether the person subsequently reappears alive or dead (the appearance of the person alive or dead merely determines the outcome of the enforced disappearance, but does not mean it has not occurred and constituted several violations of human rights); nor should the period of time during which the person has disappeared be taken into account in

determining whether there has been a disappearance (although it is important in evaluating and deciding reparations, which in the individual sphere are equivalent to the harm suffered, and in determining legislative or other measures to guarantee the non-repetition of the acts).

10. Finally, if the State has no previous history of such acts and is found to have practiced an enforced disappearance because it has subjected a person to “secret detention”, there will be no need to resort to any additional evidence that demonstrates similar acts in other cases in the past; let us assume that this is the first case received by the Committee: should it have decided differently in the absence of previous instances? To conclude that it would be regrettable, and would lead to an absurd outcome.

11. It does not matter which State is responsible or what its behaviour has been in the past in respecting and guaranteeing the rights of individuals: if it has held a person in “secret detention”, it has carried out an enforced disappearance and the Committee should find that this is the case, with all the attendant legal consequences. In analysing individual communications, the cases of all victims deserve identical respect and treatment by the Human Rights Committee.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**Q. Communication No. 1805/2008, *Benali v. Libya*
(Views adopted on 1 November 2012, 106th session)***

<i>Submitted by:</i>	Mussa Ali Mussa Benali (represented by Al-Karama for Human Rights and TRIAL)
<i>Alleged victims:</i>	Mussa Ali Mussa Benali and Abdeladim Ali Mussa Benali – the author and his brother
<i>State party:</i>	Libya
<i>Date of communication:</i>	30 May 2008 (initial submission)
<i>Subject matter:</i>	Unlawful arrest, incommunicado detention, torture and ill-treatment, arrest without a warrant, enforced disappearance
<i>Procedural issue:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Right to an effective remedy; right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of persons deprived of their liberty; recognition as a person before the law
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 16; and 21
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2012,

Having concluded its consideration of communication No. 1805/2008, submitted to the Human Rights Committee by Mussa Ali Mussa Benali under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. The text of an individual (dissenting) opinion by Mr. Krister Thelin is attached to these views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 30 May 2008, is Mussa Ali Mussa Benali, a Libyan national. He submits the communication on behalf of his brother, Abdeladim Ali Mussa Benali, also a Libyan national, and on his own behalf. He claims that Libya violated article 2, paragraph 3; article 6, paragraph 1; article 7, article 9, paragraphs 1–4; article 10, paragraph 1; and article 16 of the Covenant. The Optional Protocol entered into force for Libya on 16 August 1989. He is jointly represented by the organizations Al-Karama for Human Rights and TRIAL (Track Impunity Always).

1.2 On 20 August 2008, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of Abdeladim Ali Mussa Benali, so as to avoid irreparable damage to him, and inform the Committee on the measures taken within 30 days of the request.¹

The facts as presented by the author

2.1 The author submits that his brother Abdeladim Ali Mussa Benali is a Libyan citizen, born in Darnah in 1969. He resided at the family residence situated in Essahel Acharqi (Darnah) and used to work at the state-owned Darnah furniture factory. The author himself was born in Darnah in 1964, and at the time of filing the communication he was a Libyan citizen residing in the United Kingdom.

2.2 The author submits that on 9 August 1995, Abdeladim Ali Mussa Benali was arrested by the agents of the Internal Security Agency (ISA). Prior to his arrest, ISA had subjected him to close surveillance. He had been routinely followed by ISA agents and had been under orders to report daily at the Darnah ISA headquarters. Since July 1995, he had reported in person to the internal security agents every morning and had been systematically held at the ISA until the evening.

2.3 The author submits that, after Abdeladim Ali Mussa Benali's arrest on 9 August 1995, he was kept for two hours at the Darnah ISA headquarters, and then transferred to Benghazi, to be finally brought by plane to Tripoli. The author and the family later learned that Abdeladim Ali Mussa Benali was held in secret detention for more than five years in the Abu Slim prison. He spent his first two years there in an underground cell which he was never allowed to leave.

2.4 In September 2000, Abdeladim Ali Mussa Benali's relatives, who had received no news about him during all this time, were informed that he was alive but detained at the Abu Slim prison and were authorized to visit him. During this first visit in September 2000, Mr. Benali told his family that he had been regularly tortured (viciously beaten with iron bars and similar objects and deprived of food) and that he suffered from the after-effects of these abuses. He also explained that he had never been formally charged with any crimes and had never been brought before a judge.

2.5 The author submits that on 15 October 2002,² Abdeladim Ali Mussa Benali was released without ever having been charged with a crime. He reunited with his family in Darnah and resumed his work in the furniture factory, after various governmental institutions — namely the ISA, the People's Social Command in Darnah and the Gaddafi

¹ The Committee never received the requested information from the State party.

² Mr. Benali had been detained for seven years and two months during this first period of time.

International Charity and Development Foundation — expressly approved his return to his professional life in letters that provide corroborating evidence of his prior detention.

2.6 The author submits that by the end of 2004, Abdeladim Ali Mussa Benali was again subjected to harassment and intimidation by ISA. On 16 February 2005, Abdeladim Ali Mussa Benali went to the British embassy in order to request a visa to travel to the United Kingdom of Great Britain and Northern Ireland. That same day, he was arrested again by internal security agents who were waiting for him at the family home. He was brought to the ISA headquarters in Benghazi, where he was tortured for many days, until he was transferred to the Al Abiar detention centre, which was managed by the same agency. He was secretly detained there until the beginning of 2006, when he was transferred to the Abu Slim prison. Once in Abu Slim prison, he was frequently beaten and mistreated and, as during his previous detention, he was kept in isolation in an underground cell for a long period of time.

2.7 The author submits that in May 2006, his family was informed of Abdeladim Ali Mussa Benali's whereabouts and allowed to visit him once a month, until September 2006. During those visits, the members of his family were told that he had once again suffered grave abuses and that no legal proceedings had been undertaken against him. However, at the beginning of October 2006, after riots in the Abu Slim prison, all visits were forbidden.

2.8 On 3 October 2006, a protest broke out in the prison following the return of 190 prisoners who had been brought to court to be retried and had had their convictions confirmed. An altercation started with some of the prison guards. On 4 October 2006, the security services launched an intervention into the prison in which tear-gas grenades and live ammunition were used against detainees. As a result, at least one inmate was killed and about ten were injured. Abdeladim Ali Mussa Benali was able to report this incident to a representative of the organization Al-Karama for Human Rights, by means of a cell phone that he had hidden from the prison guards. Libyan authorities afterwards took severe reprisals against the detainees for the riot. There was a general search of the whole facility, a drastic cut in food rations and a general prohibition of family visits. Those inmates suspected of having communicated with the outside world regarding the situation in prison were tortured by security services. The detainees were also coerced into revealing who had fomented the protest. Despite the high risk to which he was exposed, the Abdeladim Ali Mussa Benali managed to give important information on flagrant violations of detainees' fundamental rights in Abu Slim on several occasions in the months following the protest.

2.9 The author submits that, according to reliable sources,³ Abdeladim Ali Mussa Benali disappeared on 23 March 2007 from the Abu Slim prison. His relatives have not been able to gather any information concerning his fate or whereabouts. On 18 May 2007, his disappearance was brought to the attention of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Enforced or Involuntary Disappearances and the Special Representative of the Secretary-General on human rights defenders.

2.10 On 30 April 2009, the author informed the Committee that Mr. Benali had been visited in Abu Slim prison by one of his brothers on 26 April 2009.

2.11 The author submitted that fear of reprisals from the Government prevented him from complaining to judicial authorities or resorting to other remedies provided for in domestic law. The regime in Libya had notoriously engaged in merciless repression with the aim of putting down any kind of political opposition. The mere fact of inquiring about the situation of a relative may result in detention, torture or death at the hands of the security forces. The

³ The author does not specify which sources he is referring to.

author said that, despite the extremely poor human rights record of the State party, complaints for such violations before national courts were virtually non-existent.

2.12 The author argued that, even if he could have had access to remedies before national courts, they would have been totally ineffective because of the deeply flawed Libyan justice system. The executive branch exercised complete control over judicial authorities. Not only was Colonel Gaddafi empowered to set up special, field or emergency tribunals, but he was also entitled to revoke judgments handed down by courts, and even to sit in the place of the Supreme Court. The author argued that the domestic remedies were ineffective, and therefore he did not need to exhaust them.

The complaint

3.1 The author claims that the State party violated article 6, paragraph 1, of the Covenant. Any situation of unacknowledged and incommunicado detention, such as that suffered by Abdeladim Ali Mussa Benali, entails a major threat to the life of the persons concerned, given the fact that, by its very nature, such a context places the victim entirely at the mercy of those who hold him.⁴ Even if these circumstances do not bring about the actual death of the victim, it appears clearly that the State party has not fulfilled its obligation to protect the victim's inherent right to life and is, to that extent, in breach of article 6 of the Covenant.⁵

3.2 The author claims that the State party violated article 7 of the Covenant. The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment has been violated in respect of the author and his brother, Abdeladim Ali Mussa Benali. The very fact of being subjected to an enforced disappearance amounts to cruel, inhuman or degrading treatment.⁶ Indeed, stress and anguish provoked by indefinite detention with no contact with the family or with the outside world constitutes a treatment incompatible with article 7 of the Covenant, as stated by the Committee on many occasions.⁷ In addition to the suffering inevitably caused by being held incommunicado, Abdeladim Ali Mussa Benali has repeatedly been subjected to acts of torture, prolonged confinement in an underground cell, and deprivation of food.

3.3 The author submits that, as a close family member of Abdeladim Ali Mussa Benali, he himself has suffered acute stress and anguish resulting from uncertainty and fully justified fear about his brother's fate. Such suffering of victims' family members has been repeatedly recognized by the Committee as amounting to a violation of article 7 of the Covenant.

3.4 The author claims that both arrests in this case were made in total disregard of established procedures. During the two periods of detention, Abdeladim Ali Mussa Benali was not informed of the reasons for his arrest. Also, in violation of Abdeladim Ali Mussa Benali's procedural rights, he was not brought before a judge or any other officer exercising judicial power. Moreover, no criminal prosecution has ever been initiated against him.

⁴ The author refers to the Committee's general comment No. 6 (1982) on the right to life, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 3.

⁵ The author refers to communication No. 84/1981, *Barbato and Barbato v. Uruguay*, Views adopted on 21 October 1982.

⁶ The author refers to communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1995, and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996.

⁷ The author refers to communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003.

Abdeladim Ali Mussa Benali has been deprived of the possibility of challenging the legality of the detentions. As explained above, he has had no access to legal counsel and very limited access to his family. Therefore, the author claims that the State party breached its obligations under article 9, paragraphs 1–4, of the Covenant.

3.5 The author argues that the violations of article 7 committed against Abdeladim Ali Mussa Benali also constitute breaches of article 10 of the Covenant, since he was deprived of liberty at the time the abuses were perpetrated.

3.6 The author claims that Mr. Benali has been subjected to an enforced disappearance since 23 March 2007,⁸ as well as between his first arrest in 1995 and September 2000 and during the first year of his second detention starting 16 February 2005, when he was held by internal security agents who never admitted his detention. The author argues that, since such disappearances render the victim incapable of enforcing any legal rights or protection mechanisms, enforced disappearances amount to a negation of legal personality in that the victim does not exist in the legal sphere. The author further submits that the Committee has held that enforced disappearances violate article 16 of the Covenant.⁹

3.7 The author states that the State party violated article 2, paragraph 3, of the Covenant. Judicial actions before domestic courts and other possible legal avenues established according to national law to seek redress were unavailable to victims of crimes such as those perpetrated against Mr. Benali. In the circumstances prevailing in the country, persons seeking redress for such violations would in any case be deprived of any chance of being successful. The Committee has affirmed that all States parties to the Covenant are “under the duty to thoroughly investigate without undue delay alleged violations of human rights, with a view to holding accountable those proven to be responsible thereof”.¹⁰ No serious efforts were made to shed light on circumstances surrounding grave crimes and to bring perpetrators to justice, thus the right to an effective remedy was breached. In addition, considering that it has been established that the positive obligation to ensure rights guaranteed under the Covenant encompasses the obligation of providing effective remedies whenever a violation has occurred, the failure to take necessary measures to protect those rights established by articles 6, 7, 9, 10, and 16 amounts in itself to an autonomous violation of the said rights read in conjunction with article 2, paragraph 3, of the Covenant.

State party’s failure to cooperate

4. On 1 May 2009, 18 August 2009 and 22 December 2009, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. The State party has further failed to provide information on whether any measures were taken to protect the life, safety and personal integrity of Abdeladim Ali Mussa Benali. It regrets the State party’s failure to provide any information with regard to the admissibility and/or substance of the author’s claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the absence of a reply from the State party, due weight must be given to those of the author’s allegations that have been properly substantiated.¹¹

⁸ Until Abdeladim Ali Mussa Benali was able to meet with his brother on 26 April 2009.

⁹ The author refers to communication No. 1328/2004, *Kimouche et al. v. Algeria*, Views adopted on 10 July 2007.

¹⁰ The author refers to communication No. 612/1995, *Chaparro et al. v. Colombia*, Views adopted on 29 July 1997.

¹¹ See, inter alia, communication Nos. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol of the Covenant.

5.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under any other international procedure of investigation or settlement. The Committee notes that the author brought his brother's situation to the attention of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Representative of the Secretary-General on human rights defenders. The Committee recalls, however, that extra-conventional procedures or mechanisms established by the former Commission on Human Rights, the Human Rights Council or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹²

5.3 With respect to the question of exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no information or observations on the admissibility or merits of the communication have been received from the State party. Given these circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The Committee considers that the author's allegations have been sufficiently substantiated, and thus proceeds to its consideration on the merits in respect of the claims made with respect to: (a) Abdeladim Ali Mussa Benali, under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; and article 16, of the Covenant; (b) the author himself, under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the failure of the State party to provide any information regarding the author's allegations, and reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.¹³ It is implicit in article 4, paragraph 2, of the Optional

on 24 October 2007, para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

¹² See *Celis Laureano v. Peru*, para. 7.1; communication No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*, Views adopted on 20 October 2010, para. 6.2.

¹³ See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.7; and communication No. 1297/2004, *Medjnoue v. Algeria*, Views adopted 14 July 2006, para. 8.3.

Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations.

6.3 The Committee notes the author's unrefuted allegation that Abdeladim Ali Mussa Benali was kept in incommunicado detention in undisclosed locations from the time of his first arrest in August 1995 until September 2000, and from the time of his second arrest in February 2005 until May 2006. During these periods, he was kept in isolation, prevented from any contact with family or legal counsel, and tortured. His family had no means of protecting him, and feared retaliation if they questioned the authority of his captors. From September 2000 until his release in October 2002 and from May 2006 until October 2006, the authorities informed his family of his whereabouts and allowed them occasional visits. From October 2006 until March 2007, he was once again held incommunicado, apparently in Abu Slim prison, from which he reportedly disappeared in March 2007; his family was finally informed regarding his whereabouts and allowed to visit him in April 2009. Thus, for major portions of his years of incarceration, his detention had the character of an enforced disappearance.

6.4 The Committee notes that, on several occasions, Abdeladim Ali Mussa Benali was held by the State party's authorities for prolonged periods of time, at a location unknown to his family and without the possibility of communicating with the outside world. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal or failure to acknowledge that fact, or by concealment of the fate or whereabouts of the disappeared person, places such persons outside the protection of the law, and puts their lives in substantial and ongoing danger for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it fulfilled its obligation to protect Abdeladim Ali Mussa Benali's life. Indeed, the Committee, through previous cases, is also aware that other persons held in circumstances such as those endured by the author have been found to have been killed or failed to reappear alive. The Committee concludes that the State party failed in its duty to protect Abdeladim Ali Mussa Benali's life, in violation of article 6, paragraph 1, of the Covenant.

6.5 Regarding the incommunicado detention of Abdeladim Ali Mussa Benali, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment,¹⁴ in which the Committee recommends that States parties should make provision against incommunicado detention. The Committee notes that the State party has provided no response to the author's allegations regarding the incommunicado detention of Abdeladim Ali Mussa Benali from August 1995 to September 2000; from February 2005 to May 2006; and from October 2006 to April 2009. On the basis of the information at its disposal, the Committee considers that these three periods of incommunicado detention constitute violations of article 7 of the Covenant.¹⁵

¹⁴ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A.*

¹⁵ See *El Alwani v. Libyan Arab Jamahiriya*, para. 6.5; *El Hassy v. Libyan Arab Jamahiriya*, para. 6.2;

6.6 With regard to the author, the Committee notes the anguish and distress caused by the disappearance of his brother, Abdeladim Ali Mussa Benali. Recalling its jurisprudence, the Committee concludes that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.¹⁶

6.7 Regarding article 9, the information before the Committee shows that Abdeladim Ali Mussa Benali was twice arrested without a warrant by agents of the State party, and that he was held in incommunicado detention on each occasion, without access to defence counsel, without being informed of the grounds for his arrest and without being brought before a judicial authority. During these periods, Abdeladim Ali Mussa Benali was unable to challenge the legality of his detention or its arbitrary character. In the absence of any explanation from the State party, the Committee finds violations of article 9 of the Covenant with regard to the arbitrary arrests and detentions of Abdeladim Ali Mussa Benali.¹⁷

6.8 The Committee has taken note of the author's allegation that Abdeladim Ali Mussa Benali was subjected to acts of torture during his detention, and held in inhuman conditions. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of Abdeladim Ali Mussa Benali in detention, the Committee concludes that the rights of Abdeladim Ali Mussa Benali under articles 7 and 10, paragraph 1, were violated.¹⁸

6.9 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant) have been systematically impeded.¹⁹ In the present case, the author alleges that the State party authorities failed to provide Abdeladim Ali Mussa Benali's family with relevant information concerning his fate or whereabouts for periods encompassing several years, and that the State party maintained at the relevant time a climate in which family members were intimidated from initiating legal proceedings or even inquiring about detention by the security forces. The State party has provided no evidence refuting these allegations. The Committee finds that the enforced disappearance and incommunicado detention of Abdeladim Ali Mussa Benali

Celis Laureano v. Peru, para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

¹⁶ See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.11; communication No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14; and *Sarma v. Sri Lanka*, para. 9.5.

¹⁷ See *Medjnoune v. Algeria*, para. 8.5; communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 8.7.

¹⁸ See the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.7; and *El Hassy v. Libyan Arab Jamahiriya*, para. 6.4.

¹⁹ See *El Abani v. Libyan Arab Jamahiriya*, para. 7.9; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7; communication No. 1782/2008, *Aboufaied v. Libya*, Views adopted on 21 March 2012, para. 7.10.

deprived him of the protection of the law during the relevant periods, in violation of article 16 of the Covenant.

6.10 The author invokes article 2, paragraph 3, of the Covenant, which requires State parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to State parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant,²⁰ in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before the Committee indicates that Abdeladim Ali Mussa Benali did not have access to an effective remedy, leading the Committee to find a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant vis-à-vis Abdeladim Ali Mussa Benali.²¹ The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.²²

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations by the State party of article 6, paragraph 1; articles 7 and 9; article 10, paragraph 1, and article 16 with regard to Abdeladim Ali Mussa Benali. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; articles 7 and 9; article 10, paragraph 1; and article 16 vis-à-vis Abdeladim Ali Mussa Benali. Lastly, the Committee finds violations of article 7 and article 2, paragraph 3, read in conjunction with article 7 of the Covenant with regard to the author.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including (a) freeing Abdeladim Ali Mussa Benali immediately, if he is still being detained; (b) if he died in custody, returning his remains to his family; (c) conducting a thorough and effective investigation into his disappearance and any ill-treatment that he suffered in detention; (d) providing the author and Abdeladim Ali Mussa Benali with detailed information on the results of its investigations; (e) prosecuting, trying, and punishing those responsible for the enforced disappearance or other ill-treatment; and (f) providing appropriate compensation to the author and Abdeladim Ali Mussa Benali for the violations that they suffered. The State party is also under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give

²⁰ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

²¹ See *El Hassy v. the Libyan Arab Jamahiriya*, para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

²² See *Chihoub v. Algeria*, para. 8.11.

effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual (dissenting) opinion of Mr. Krister Thelin

The majority has found a direct violation of article 6 of the Covenant. I disagree. For reasons stated in the dissenting opinion by Mr. Michael O'Flaherty and myself in another recent case (communication No. 1753/2008, *Guezout v. Algeria*), the Committee should have followed its established jurisprudence and found a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, of the Covenant.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**R. Communication No. 1806/2008, *Saadoun et al. v. Algeria*
(Views adopted on 22 March 2013, 107th session)***

<i>Submitted by:</i>	Mustapha Saadoun, his wife, Malika Gaid Youcef (<i>both deceased</i>), and their daughter, Nouria Saadoun (represented by the Collectif des familles des disparu(e)s en Algérie (Collective of Families of the Disappeared in Algeria))
<i>Alleged victims:</i>	Djamel Saadoun (the authors' son and brother) and the authors themselves
<i>State party:</i>	Algeria
<i>Date of communication:</i>	30 June 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	2, para. 3; 7; 9, paras. 1–4; and 16
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2013,

Having concluded its consideration of communication No. 1806/2008, submitted to the Human Rights Committee by Mustapha Saadoun, his wife, Malika Gaid Youcef, and their daughter, Nouria Saadoun, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not participate in the consideration of the communication.

The text of an individual opinion by Committee member, Mr. Victor Manuel Rodríguez-Rescia, is appended to the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, dated 30 June 2008, are Mustapha Saadoun and his wife, Malika Gaid Youcef, Algerian nationals born on 26 August 1918 and 20 December 1927, respectively. They claim that their son, Djamel Saadoun, an Algerian national born on 26 February 1967, is the victim of violations by Algeria of article 2, paragraph 3, articles 7, 9 and 16 of the International Covenant on Civil and Political Rights. They further claim that they themselves are victims of violations of articles 2, paragraph 3, and 7 of the Covenant. The authors are represented by the Collectif des familles des disparu(e)s en Algérie (Collective of Families of the Disappeared in Algeria).

1.2 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the substance of the case separately.

The facts as submitted by the authors

2.1 Djamel Saadoun was a doctoral student in mechanics and a lecturer at the El-Harrach Polytechnic in Algiers. He had been granted a deferment of military service in order to pursue his studies. His application for a scholarship had just been accepted and he was planning to go to France to continue his studies.

Arrest and administrative detention in the Bouzareah gendarmerie on 7 and 8 March 1996

2.2 On 7 March 1996, Djamel Saadoun received a letter instructing him to report immediately to his area gendarmerie in Bouzareah in order to perform his military service. At 5 p.m. that day, the gendarmes of Bouzareah came to his home at 5 rue du Traité, in El Biar, with a conscription order in his name and ordered him to go with them to join up. Djamel Saadoun was surprised and told them that, as a student, he had been granted a deferment of military service and that he did not understand why it was so urgent since the conscription order had arrived that very morning. He was nevertheless arrested with no explanation and no answers to his questions. Djamel Saadoun was then taken first to the Bouzareah gendarmerie along with 31 other people from his neighbourhood. They spent the night of 7 March there. They were then sent to the transport camp, known as the “army muster centre”, some 50 km from Algiers, in the *wilaya* of Blida. There they found themselves with 2,000 other conscripts, also on deferment. During his detention, which lasted nearly a week, a cousin living nearby visited him several times in the Blida camp. Djamel had sent her his military registration number, 87/161/06/576. On 14 March 1996, Djamel Saadoun was transferred to the Bechar camp.

Bechar camp, 14–18 March 1996, then Abadla camp, 18 March–June 1996

2.3 During this period of detention, which as far as the military authorities were concerned was military training, Djamel wrote three letters to his family – on 25 March, 9 April and 4 May 1996. The authors claim that these letters make it possible to establish in detail the events leading up to his disappearance. In the first letter, dated 25 March 1996, Djamel Saadoun tells his parents that on 14 March 1996, he and many other conscripts were taken from the transport camp to the military airport at Boufarik, 35 km from Algiers, and were put on a military plane for Bechar. There he remained four days, during which he was given a medical examination. He then had to put on the military uniform he had been given. According to the letter of 5 March 1996, he was then taken by bus to Abadla, some 90 km south of Bechar. He arrived in Abadla at 11 a.m. on Monday 18 March 1996. He was given to understand that there would be a committee in the Abadla camp to look at breadwinners’ cases. He and the other conscripts were lodged for two days in huts belonging to Saharans from the Polisario Front, to whom Algeria had given asylum. He was

then taken to a camp where there were tents as far as the eye could see. According to Djamel Saadoun's letters, "there were far more people than the training camp could handle. There were around 1,500 people, 700 of them draft evaders. The draft evaders included more than 400 university graduates (doctors, PhDs, engineers, etc.)." He also wrote that they had "confiscated" his papers and his files because, "contrary to what had been stated before, [they] had been told that graduates could not be exempted [from military service]". Djamel Saadoun wrote that training began on Saturday 23 March 1996 and that he had met some of his friends, most of whom were on deferment like himself, and a cousin, who was in the same unit.

2.4 In his letter, Djamel Saadoun also describes the living conditions and the atmosphere in the camp, and tells his family that he is unable to talk to them on the telephone because there is just one telephone booth for around 1,500 people, and no calls could be made until after 5 p.m. In his second letter, dated 9 April 1996, Djamel Saadoun writes that he does not know how long the training will last and that "things [were] very vague [on that point]". He gives the postal address of the camp that he has been assigned to. In his last letter, of 4 May 1996, Djamel Saadoun writes that he still does not know when the training is supposed to finish and that he would be told what his assignment was at the end of May 1996.

2.5 In June 1996, Malika Gaid Youcef, Djamel Saadoun's mother, received a call from one of Djamel's friends, who was doing his military service in the same camp and in the same unit as her son. He told Malika Gaid Youcef that Djamel was no longer in the camp with them, that the regimental commander¹ had one day come to tell Djamel to get ready to leave and he had not seen him since.² Every morning, all the conscripts would assemble on the parade ground for roll call with the regimental commander. The morning after he left the camp, his friends asked the commander why Djamel Saadoun was not at the morning roll call. The commander told them that he had had orders the day before to instruct Djamel Saadoun to get his kit together because a committee from Algiers was coming the next day to take him away. The commander said that the committee had come to fetch Djamel Saadoun, but he did not know where they had taken him. According to information received later by the family, Djamel Saadoun was not the only one to have been picked up. The trucks waiting at the gates of the camp were fully loaded.

Measures taken by Djamel Saadoun's family after his disappearance

2.6 The family went on several occasions to the Blida camp, and even to Abadla camp, to try to find out where Djamel Saadoun had been taken, but they got no answers. Worried, they then went on several occasions to the Bouzareah gendarmerie and their local police station to ask what had become of their son, still with no success. At the same time, Malika Gaid Youcef contacted a family acquaintance, an official in the Army high command in Aïn Naâdja, Algiers, who promised to make inquiries and call her as soon as he knew more. She never heard anything. Throughout her inquiries, the only answer she got — by telephone — from the military authorities was that "there is no such name as [Djamel Saadoun]".

2.7 In March 1997, i.e., a year after the forced departure of Djamel Saadoun for military service, which the authors describe as arrest, the authors' home in El Biar was searched. The apartment was empty as the authors had since moved. On 21 April 1997, Mustapha Saadoun received a money order for 708 Algerian dinars (DA) in the name of Djamel Saadoun from the postmaster at the ERG Farradj camp. This money order made the parents

¹ The authors give the commander's name.

² The authors do not give a date. Based on the communication submitted to the Committee later, it seems that Djamel Saadoun left Abadla camp in June 1996.

even more anxious over what might have become of their son, as they believed that amount was the equivalent of the monthly pay for a military conscript. However, they never managed to obtain any more information about the provenance of the money order.³

2.8 Not having received satisfactory replies to their inquiries, and in an attempt to clear up the mystery of their son's disappearance, the authors sent numerous written requests to all the relevant military, civil, judicial and administrative bodies. On the administrative front, 14 applications were presented between 1996 and 2007. On 30 July 1996, they addressed a joint application to the President of the Republic, the Minister of Interior, the Minister of Justice, the Ombudsman and the Chair of the National Human Rights Observatory (ONDH), asking for an explanation as to what might have happened to their son. Only ONDH acknowledged receipt of their letter on 9 March 1998, stating that Djamel Saadoun had indeed been arrested "on 7 March 1996 by the security services of the Bouzareah gendarmerie following receipt of a telegram (telegram No. 574 of 3 February 1996) from the head of military service in Algiers. Djamel Saadoun was then taken to the Blida muster and transport camp as he belonged to that area for military service purposes".⁴ When the authors heard that ONDH had been abolished and replaced by the National Advisory Commission for the Promotion and Protection of Human Rights (CNCPPDH), they lodged another complaint with that body on 23 December 2001 and, having received no reply to their first letter, on 8 July 2002. Finally, on 20 July 2002, CNCPPDH replied that "according to the services concerned, [Djamel Saadoun] was apprehended at his home on 7 March 1996 by the security services for involvement in subversive activities".⁵ According to the authors, this reply gave no information on either the place or conditions of detention of Djamel Saadoun and flatly contradicted the reply from ONDH mentioned above.

2.9 Given these contradictions, the authors again sought clarification from CNCPPDH on 1 September 2002, without success. The same day, the authors addressed a complaint to the Chief of Staff of the National People's Army, from whom they did not receive a reply either. On 15 August 2007, the authors again approached the President of the Republic, the Chair of CNCPPDH, the Minister of the Interior, the Representative of the Republic at the Court of Chercell, the Head of Government and the Minister of Justice.⁶ The authors further state that they contacted SOS Disparus on 28 July 2003 and the Collectif des familles des disparu(e)s en Algérie, the organization that on 19 August 2003 submitted Djamel Saadoun's case to the Working Group on Enforced or Involuntary Disappearances.

2.10 As to judicial remedies, a month after Djamel Saadoun's disappearance, the authors went to the Bouzareah gendarmerie in Algiers and to their local police station to obtain information. Through a lawyer, Mustapha Saadoun also lodged a complaint for "abduction"⁷ with the Bechar Court against an unknown person or persons. No action was taken on this complaint. The family also approached two other lawyers, one of whom now refuses all contact with the family for fear of reprisal from the Algerian authorities.⁸

³ The authors attach a copy of the money order to the communication.

⁴ The reply from ONDH is annexed to the communication.

⁵ The reply from CNCPPDH is annexed to the communication.

⁶ The joint application is annexed to the communication.

⁷ The authors do not give the date of this complaint.

⁸ The authors claim that the case of Djamel Saadoun is not unique in Algeria; more than 8,000 families are still searching for their disappeared relatives, most of them arrested by the police, the gendarmes, the militias, the military or the municipal police (*garde communale*). They also state that the majority of perpetrators of enforced disappearances, individuals who are known and have been named by witnesses or by victims' families, enjoy complete impunity to this day as the Algerian authorities have not provided a satisfactory response to the many inquiries made by associations of relatives of

2.11 On 15 August 2007, a further complaint was lodged by Mustapha Saadoun with the public prosecutor at the Court of ChercHELL, the outcome of which was a communication from the city police (*sûreté urbaine*), dated 27 October 2007, suggesting that he apply to the Ministry of Defence. Later, on 8 January 2008, the public prosecutor at the Court of ChercHELL summoned Mustapha Saadoun and advised him to lodge a complaint with the court prosecutor for the *wilaya* of Bechar.

2.12 The authors also say that, as a result of the adoption of the Charter for Peace and National Reconciliation by referendum on 29 September 2005, and of its implementing legislation, which entered into force on 28 February 2006, it is now impossible to claim that the State party has effective domestic remedies of which the families of victims of enforced disappearance may avail themselves. They claim that Ordinance No. 06-01 of 27 February 2006 which implements the Charter⁹ blocks any possibility of legal action against State agents, as article 45 states that “legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic. Any allegation or complaint shall be declared inadmissible by the competent judicial authority.” Ordinance No. 06-01 of 27 February 2006 has thus precluded any judicial remedies since its entry into force on 28 February 2006. Accordingly, the authors claim that, although their efforts have been in vain and their inquiries fruitless in the absence of any effective remedy,¹⁰ under article 45 of Ordinance No. 06-01, they have been deprived of any redress, since they are legally unable to institute proceedings or seek a remedy. Thus, according to the authors and under the new Algerian legislation, there is no longer any available remedy within the meaning of article 2, paragraph 3, of the Covenant for the families of victims of enforced disappearance.¹¹

The complaint

3.1 The authors invoke article 2, paragraph 3, of the Covenant, arguing that their son, Djamel Saadoun, has been deprived of his legitimate right to an effective remedy because his detention has not been recognized. Not only have the authorities failed to make all the necessary inquiries to establish the circumstances in which he disappeared, identify those responsible and bring them to trial, but they deny any involvement in Djamel Saadoun’s disappearance. Moreover, the two applications submitted by the family’s lawyers have exposed the futility of any judicial proceedings, since both the complaints were dismissed, in violation of the rights guaranteed under article 2, paragraph 3.

disappeared persons and international human rights organizations. Lastly, the authors state that since 2000, the Working Group on Enforced or Involuntary Disappearances has been asking to be allowed to visit Algeria further to its mandate, to no avail.

⁹ Ordinance No. 06-01 of 28 Muharram 1427 (28 February 2006), implementing the Charter for Peace and National Reconciliation, *Official Gazette* No. 11, 28 February 2006.

¹⁰ The authors refer to communication No. 147/1983, *Reverdito and Gilboa v. Uruguay*, Views adopted on 1 November 1985.

¹¹ The authors refer to the Committee’s concluding observations of 1 November 2007 on the third periodic report of Algeria (CCPR/C/DZA/CO/3, paras. 7–12), in which the Committee noted that Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, in particular article 45, was a violation of the right to an effective remedy. Recalling the Committee’s view that, in respect of violations of fundamental rights, only remedies of a judicial nature need to be exhausted, the authors refer to communications Nos. 563/1993, *Bautista (Andreu) v. Colombia*, Views adopted on 27 October 1995; 612/1995, *Chaparro et al. v. Colombia*, Views adopted on 29 July 1997; and 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002.

3.2 The authors also invoke article 7 of the Covenant, arguing that the enforced disappearance of Djamel Saadoun constitutes in itself inhuman and degrading treatment.¹² Djamel Saadoun was arbitrarily deprived of his liberty and then removed from the protection of the law by the authorities, who made it impossible for him to communicate with anyone, in particular his family. The authors claim that the suffering caused by isolation of this kind and the withdrawal of all legal safeguards constitute inhuman and degrading treatment of Djamel Saadoun. The authors point to their own anguish and the distress caused by the disappearance of their only son. Mustapha Saadoun is over 90 years old and walks with difficulty owing to numerous problems with his joints. Malika Gaid Youcef is bedridden. Both have gone through and still go through every day, great physical and psychological suffering owing to their son's disappearance; they live with the constant anguish that they may die without seeing their son again or without learning the truth about his disappearance after 11 long years.¹³ Accordingly, they claim to be themselves victims of a violation of article 7 of the Covenant and cite the Committee's case law.¹⁴

3.3 The authors also invoke article 9 of the Covenant, arguing that Djamel Saadoun was a victim of two violations of this provision. First, he was arrested on 7 March 1996 by the gendarmes in Bouzareah in order to perform his military service when he was legally on deferment. After his arrest he was transferred to various official premises belonging to the Army (the gendarmerie, army muster centre, Bechar camp and lastly, Abadla camp), in which he was deprived of his liberty. This deprivation of liberty, for which no grounds has been given and which was clearly unlawful, given the legal situation of the individual concerned, constitutes arbitrary detention within the meaning of article 9 of the Covenant. In June 1996, Djamel Saadoun was arrested again by a "committee from Algiers," which resulted in his enforced disappearance, given that no information has subsequently been provided on his place of detention or what has happened to him. The fact that his detention has not been acknowledged and was carried out in complete disregard of the guarantees set forth in article 9 of the Covenant; investigations have not displayed the efficiency or effectiveness required in such circumstances; and the authorities persist in concealing what has happened to him means that he has been arbitrarily deprived of his liberty and security, as well as of the protection afforded by the guarantees specified in article 9.¹⁵

3.4 The authors also invoke article 16 of the Covenant, and note that the Algerian authorities have denied Djamel Saadoun's right to recognition as a person, as they have

¹² The authors cite communications Nos. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994; 540/1993, *Atachahua v. Peru*, Views adopted on 25 March 1996; and 542/1993, *N'Goya v. Zaire*, Views adopted on 25 March 1996.

¹³ Around 17 years, by the time of the Committee's consideration of the communication.

¹⁴ Communications Nos. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983; 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007; 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007; and 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006. The authors also refer to the Committee's concluding observations on the second periodic report of Algeria, 18 August 1998 (CCPR/C/79/Add.95, para. 10).

¹⁵ The authors cite communications Nos. 612/1995, *Chaparro et al. v. Colombia*, Views adopted on 29 July 1997; 542/1993, *N'Goya v. Zaire*, Views adopted on 25 March 1996; 540/1993, *Atachahua v. Peru*, Views adopted on 25 March 1996; 181/1984, *Arévalo Perez v. Colombia*, Views adopted on 3 November 1989; 139/1983, *Thomas and Conteris v. Uruguay*, Views adopted on 17 July 1985; 8/1977, *Netto, Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980; and 56/1979, *Casariago (Cavallero) v. Uruguay*, Views adopted on 29 July 1981.

subjected him to unacknowledged detention and therefore removed him from the protection of the law.¹⁶

3.5 In conclusion, the authors repeat their request to the Committee to find that the State party has acted in violation of article 2, paragraph 3, articles 7, 9 and 16 of the Covenant in respect of Djamel Saadoun, and of article 2, paragraph 3, and article 7 of the Covenant in respect of the authors themselves. They also ask the Committee to request the State party to order independent investigations as a matter of urgency with a view to (1) locating Djamel Saadoun; (2) bringing the perpetrators of the enforced disappearance before the competent civil authorities for prosecution; and (3) provide adequate, effective and prompt reparation for the harm suffered.¹⁷

State party's observations on admissibility

4.1 On 3 March 2009, the State party, in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation", contested the admissibility of the present communication and 10 other communications submitted to the Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period, the Government was fighting against groups that were not coordinated among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. On the basis of data recorded by a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who, in fact, had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services, but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had

¹⁶ The authors refer to the Committee's concluding observations (CCPR/C/79/Add.95, para. 10) in which the Committee recognized that enforced disappearances might involve the right guaranteed under article 16 of the Covenant.

¹⁷ To include (a) adequate compensation, proportionate to the gravity of the offence and the particular circumstances of this case and covering physical and psychological harm, loss of opportunities, including in respect of employment and social benefits, material harm and loss of earnings, including loss of earning capacity, moral damages and expenses incurred for medicines and medical services; (b) full and complete rehabilitation including medical care and psychological support and access to legal and social services; and (c) guarantees of non-repetition, in part by the setting up of an independent commission to make a thorough investigation of the fate of disappeared persons in Algeria, whether the disappearances were caused by the authorities or armed groups.

stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the “national tragedy” would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of DA 371,459,390 has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors’ statements,¹⁸ the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if he deems it warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes complainants to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, has not utilized in this case, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author’s contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed that they did not need to bring the matter before the relevant courts, in view of the courts’ likely position and findings regarding the application of the Ordinance. However, the authors cannot invoke

¹⁸ As the State party has provided a common reply to 11 different communications, it refers to the “authors”. This reference also includes the author(s) of the present communication.

this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.¹⁹

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. The ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note the similarity of the facts and situations described by the authors and to take into account the sociopolitical and security context in which they occurred; to find that the authors failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the authors seek an alternative remedy.

Additional observations by the State party on the admissibility of the communication

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances

¹⁹ The State party cites, in particular, communication No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

of which the latter may be unaware. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in these cases to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the authors did not use channels that would have allowed consideration of the case by the Algerian judicial authorities for any of the complaints or requests for information that they submitted.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the authors to submit their allegations to examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the Ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties towards the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proven to have taken place in any other context are subject to investigation by the appropriate courts.

Comments on the State party’s observations on admissibility

6.1 On 17 December 2012, the authors’ counsel informed the Committee that the authors had passed away since the submission of their initial communication to the Committee.²⁰ Their daughter, Nouria Saadoun, Djamel Saadoun’s sister, was continuing the search and proceedings before the Committee in relation to the communication.²¹

6.2 On the same day, the authors’ counsel submitted comments on the State party’s observations on admissibility. Counsel draws the Committee’s attention to the general nature of the State party’s reply to the communication, a reply that is systematically presented for all the individual communications pending before the Committee since the entry into force of the Algerian Charter and its implementing legislation; no mention is made of the particular features of the case or the remedies sought by the victim’s family. As

²⁰ Mustapha Saadoun died on 26 January 2009, and Malika Gaid Youcef died on 26 May 2009.

²¹ On 27 March 2013, Nouria Saadoun submitted a written confirmation to the Committee, that she wished to pursue the procedure before the Committee on behalf of her brother, Djamel Saadoun, her parents, and herself.

to the exhaustion of domestic remedies, counsel refers to the authors' initial communication and again points out that they attempted numerous remedies, all of which proved futile. Of the numerous judicial and non-judicial complaints they lodged between 1996 and 2007, none has led to a thorough inquiry or criminal proceedings, despite the fact that their allegations were serious ones of enforced disappearance.²² Counsel further points out that the fact that the family has not sued for damages does not make the communication inadmissible since that procedure does not constitute an appropriate remedy.²³ Counsel recalls that the authors lodged several complaints with the Bechar and ChercHELL courts and that no action was taken, and again states that Ordinance 06-01 precludes any possibility of legal action against agents of the State, since article 45 unequivocally states that any allegation or complaint against agents of the State shall automatically be declared inadmissible by the competent judicial authority, thereby rendering unavailable all remedies invoked against agents of the State on behalf of victims of disappearances.²⁴ Accordingly, the authors' counsel claims that article 45 of Ordinance 06-01, which disregards the rights guaranteed under the Covenant, cannot be cited in counterargument against the authors, and that the authors have exhausted all available domestic remedies.

6.3 The authors' counsel rejects the State party's argument that the Committee should take a global approach to cases of enforced disappearance. According to counsel, such an approach would not be consistent with article 5 of the Optional Protocol or with rule 96 of the Committee's rules of procedure. The fact that Djamel Saadoun disappeared in 1996 in no way justifies depriving him of his right to have his communication considered by the Committee. Counsel further recalls that the Committee has expressed concern that the provisions of the implementing legislation of the Charter seem to promote impunity and infringe the right to an effective remedy, and has called upon the State party, in its concluding observations, to inform the public of the right of individuals to address the Committee under the Optional Protocol.²⁵ Counsel further notes that the legislation implementing the Charter requires the families of the disappeared to obtain a finding of presumed death in order to claim financial compensation. No effective investigation to ascertain the fate of the disappeared person is carried out by the police or the courts as part of that procedure. In these circumstances, the legislation implementing the Charter constitutes, in counsel's view, an additional violation of the rights of the families of the disappeared and is certainly not a satisfactory response to the problem of disappearances, which should be based on respect for the right to the truth, justice, full redress and the preservation of the memory of the events. Accordingly, counsel repeats that the mechanism implementing the Charter cannot be used to stop victims from submitting a communication to the Committee, and requests that the Committee find the authors' communication admissible.

²² The authors cite communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4.

²³ The authors cite the Committee's Views in communications Nos. 1753/2008, *Guezout et al. v. Algeria*, 19 July 2012, para. 7.4; 1905/2009, *Khirani v. Algeria*, 26 March 2012, para. 6.4; and 1781/2008, *Berzig v. Algeria*, 31 October 2011, para. 7.4.

²⁴ The authors cite the Committee's Views in communications Nos. 1753/2008, *Guezout et al. v. Algeria*, 19 July 2012 and 1905/2009, *Khirani v. Algeria*, 26 March 2012, and its concluding observations CCPR/C/DZA/CO/3, para. 7 (a).

²⁵ CCPR/C/DZA/CO/3, para. 8.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Firstly, the Committee points out that the Special Rapporteur's decision not to separate the decisions on admissibility and the merits (see para. 1.2 above) does not mean that the Committee cannot consider the two matters separately nor does it imply simultaneous consideration. Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Djamel Saadoun was reported to the Working Group on Enforced or Involuntary Disappearances in 2003. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.²⁶ Accordingly, the Committee considers that the examination of Djamel Saadoun's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the authors have not exhausted domestic remedies, since they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee notes that, according to the State party, the authors simply wrote letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee notes in that regard that, on 15 August 2007, the authors lodged a complaint with the prosecutor at the Court of Cherchell. No proceedings were initiated, and all the authors received in response was a report from the urban police suggesting that they approach the Ministry of Defence. The only outcome of a subsequent summons by the prosecutor at the Court of Cherchell on 8 January 2008 was advice to the authors that they should lodge a complaint with the court prosecutor of the *wilaya* of Bechar. None of the judicial remedies invoked by the authors led to an effective inquiry or the prosecution and conviction of those responsible. The Committee also takes note of the authors' argument that, since the entry into force of Ordinance No. 06-01, the families of victims of enforced disappearance have been deprived of any legal right of action to establish what happened to their relative, since any such action is liable to criminal prosecution.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to

²⁶ See, inter alia, communications Nos. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and 540/1993, *Atachahua v. Peru*, Views adopted on 25 March 1996, para. 7.1.

prosecute, try and punish anyone held to be responsible for such violations.²⁷ Although the authors repeatedly contacted the competent authorities concerning their son's disappearance, the State party failed to conduct a thorough and effective investigation into Djamel Saadoun's disappearance, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is de facto available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant.²⁸ Reiterating its previous case law, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.²⁹ The Committee finds that article 5, paragraph 2 (b), of the Optional Protocol is not an impediment to the admissibility of the communication.

7.5 The Committee considers that, for the purposes of admissibility, the authors must exhaust only the effective remedies available for the alleged violation: in the present case, valid remedies for enforced disappearance.

7.6 The Committee finds that the authors have sufficiently substantiated their allegations insofar as they raise issues under articles 7, 9, 16 and 2, paragraph 3, of the Covenant, and therefore proceeds to consider the communication on its merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party provided general and collective comments on the serious allegations made by the authors of such complaints, and has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities in cases of enforced disappearance between 1993 and 1998 must be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual, and treat every individual with respect for the dignity inherent in every human being. It further recalls its jurisprudence, according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee.³⁰ Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations with regard to the merits of the case, and the documentation from the Advisory Commission for the Promotion and Protection of Human Rights (CNCPPDH) confirms

²⁷ See, inter alia, communications Nos. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4; and 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

²⁸ Concluding observations of the Human Rights Committee, CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

²⁹ Communications Nos. 1588/2007, *Benaziza v. Algeria*, Views adopted 26 July 2010, para. 8.3; 1781/2008, *Berzig v. Algeria*, para. 7.4; and 1905/2009, *Khirani v. Algeria*, para. 6.4.

³⁰ Communications Nos. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; 1588/2007, *Benaziza v. Algeria*, para. 9.2; 1781/2008, *Berzig v. Algeria*, para. 8.2; and 1905/2009, *Khirani v. Algeria*, para. 7.2.

several of the authors' allegations. The Committee recalls its jurisprudence³¹ according to which the burden of proof should not rest solely on the author of a communication, especially given that the authors and the State party do not always have the same degree of access to evidence, and that often only the State party holds the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.³² In the absence of any explanations from the State party in this respect, or even the possibility of seriously refuting the incontrovertible evidence of the victim's detention, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the authors, Djamel Saadoun was arrested at his home on 7 March 1996 by the gendarmes, who ordered him to join the military even though he was under deferment; that, after a night at the Bouzareah gendarmerie, he was taken to the army muster centre in the *wilaya* of Blida, where he remained for approximately one week, was given an army registration number, and received visits from family. It further notes that between March and June 1996, he was transferred to the Bechar camp, then to Abadla, from where he had written to his parents; and that in June 1996, Malika Gaid Youcef received a call telling her that Djamel Saadoun was no longer at Abadla camp. None of the measures taken by the family since have shed any light on Djamel Saadoun's fate. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. In this context, the Committee recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that States parties make provision against incommunicado detention. It notes that, in this case, in June 1996, Djamel Saadoun was taken from Abadla camp by a "committee from Algiers" to an unknown destination. His fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Djamel Saadoun.³³

8.5 The Committee also takes note of the anguish and distress caused to the authors by Djamel Saadoun's disappearance. It considers that the facts before it disclose a violation with respect to the authors of article 7 of the Covenant.³⁴

8.6 With regard to the alleged violation of article 9, the Committee notes the authors' allegations to the effect that Djamel Saadoun was arrested on 7 March 1996 by the gendarmes and, without explanation, ordered to join the army, despite being under deferment; that after his arrest he was held for one night in the Bouzareah gendarmerie, then for a week at Blida camp, before being taken to the camp at Bechar and later Abadla. Two months later, his family learned from an unofficial source that he was no longer at Abadla camp and had reportedly been arrested by a "committee from Algiers". Djamel Saadoun became the victim of enforced disappearance, since no information was

³¹ See, inter alia, communications Nos. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; and 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.3.

³² Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

³³ Communications Nos. 1905/2009, *Khirani v. Algeria*, para. 7.5, 1781/2008, *Berzig v. Algeria*, para. 8.5, 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.5.

³⁴ Communication No. 1905/2009, *Khirani v. Algeria*, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.6; and communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, para. 7.5.

subsequently given to his family on where he was detained or what had happened to him. Two years after his disappearance the authors learned, from an advisory body, the National Human Rights Observatory (ONDH), that Djamel Saadoun had been arrested to perform his military service. However, in July 2002, that is, six years after his disappearance, the family learned from the National Advisory Commission for the Promotion and Protection of Human Rights (CNCPPDH), the successor to ONDH, that Djamel Saadoun had been apprehended by the security services for “involvement in subversive activities”. Yet, Djamel Saadoun was never informed of the criminal charges against him or brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention; and that no official information was given to the author or his family regarding his whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Djamel Saadoun.³⁵

8.7 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.³⁶ In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate or whereabouts of Djamel Saadoun, despite the multiple requests addressed by the authors to the State party. The Committee concludes that Djamel Saadoun’s enforced disappearance some 17 years ago denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.8 The authors invoke article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the current case, although the victim’s family repeatedly contacted the competent authorities regarding Djamel Saadoun’s disappearance, including judicial authorities such as the public prosecutor, all their efforts led to nothing and the State party failed to conduct a thorough and effective investigation into the disappearance of Djamel Saadoun. Furthermore, the absence of the legal right to initiate judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Djamel Saadoun and his family of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearance.³⁷ The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with articles 7, 9 and 16 of the

³⁵ See, inter alia, communications Nos. 1905/2009, *Khirani v. Algeria*, para. 7.7, and 1781/2008, *Berzig v. Algeria*, para. 8.7.

³⁶ Communications Nos. 1905/2009, *Khirani v. Algeria*, para. 7.8; 1781/2008, *Berzig v. Algeria*, para. 8.8; 1780/2008, *Zarzi v. Algeria*, Views adopted 22 March 2011, para. 7.9; 1588/2007, *Benaziza v. Algeria*, para. 9.8; 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and 1495/2006, *Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

³⁷ CCPR/C/DZA/CO/3, para. 7.

Covenant with regard to Djamel Saadoun, and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the authors.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7, 9, 16 and 2, paragraph 3, read in conjunction with articles 7, 9 and 16 of the Covenant, with regard to Djamel Saadoun. The Committee also finds a violation of article 2, paragraph 3, read alone and in conjunction with article 7 of the Covenant, with regard to the authors.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Djamel Saadoun with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Djamel Saadoun; (b) providing the family with detailed information about the results of its investigation; (c) releasing Djamel Saadoun immediately if he is still being detained incommunicado; (d) in the event that Djamel Saadoun is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the family for the violations suffered and to Djamel Saadoun, if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Partly dissenting opinion of Committee member, Mr. Víctor Rodríguez Rescia

1. This opinion concurs with the decision of the Human Rights Committee on communication No. 1806/2008 in finding a violation of the rights set out in article 2, paragraph 3, read in conjunction with articles 7, 9 and 16 of the Covenant, with regard to Djamel Saadoun, and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the authors.

2. As in my partly dissenting opinions on communication No. 1807/2008 (*Mechani v. Algeria*) and communication No. 1791/2008 (*Sahbi v. Algeria*), as well as in the opinion of my colleague, Mr. Salvioli, on communication No. 1791/2008, and given that the present communication deals with a similar situation in which the enforced disappearance of a victim whose whereabouts have not been revealed by an investigation has gone completely unpunished, I am afraid that once again I cannot agree with the Committee regarding the effects of the very existence, and application in this particular case, of Ordinance No. 06-01 of 27 February 2006 (and, in particular, article 45 thereof) giving effect to the Charter for Peace and National Reconciliation adopted by referendum on 29 September 2005, which prohibits taking any legal action against members of the Algerian defence and security services for the offences of torture, extrajudicial executions and enforced disappearances. Under the Ordinance, anyone submitting such an allegation or complaint is liable to a penalty of 3 to 5 years' imprisonment and a fine of 250,000 to 500,000 Algerian dinars.

International responsibility for serious human rights violations in the form of acts of the State originating in the existence and/or application of a law

3. The issuance by a State party to the Covenant, such as Algeria in the present communication, of a regulation or ordinance of general application that impedes the investigation of human rights violations such as enforced disappearances, torture or extrajudicial executions is, regardless of the reasons and context in which it is issued, in direct contravention of article 2, paragraph 3, of the Covenant, which refers to the existence and effectiveness of a legal remedy.

4. The failure by a State party to the Covenant, such as Algeria in the present communication, to bring its domestic legislation into line with the provisions of the Covenant by amending, reforming or abrogating a regulation or ordinance of general application that impedes the investigation of human rights violations such as enforced disappearances, torture or extrajudicial executions, is in direct contravention of article 2, paragraph 2, of the Covenant.

5. The very existence of the part of Ordinance No. 06-01 that establishes the possibility of sentencing anyone who reports such offences to prison terms and fines is a violation of the International Covenant on Civil and Political Rights, as it creates a platform for impunity from investigation, conviction and claims for redress in cases of serious human rights violations, including in cases of enforced disappearance like that of Djamel Saadoun, whose whereabouts are to this day unknown.

6. Even though the Committee established the remedial effects of applying the Ordinance in this particular case, the reference to the legal effects of the regulation is extremely weak and inadequate. In paragraph 10, the Committee should have made a more forceful statement valid *erga omnes* regarding Algeria's general obligation to rescind the application of article 45 of Ordinance No. 06-01. The Committee should have established

that the express prohibition in the Ordinance of taking any legal action to investigate cases of torture, extrajudicial executions and enforced disappearances violates the general obligation set out in article 2, paragraph 2, of the Covenant, under which Algeria should, “where not already provided for by existing legislative or other measures, ... take the necessary steps, in accordance with its constitutional processes and with the provisions of the ... Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ... Covenant”.

7. Algeria has systematically tried to justify its failure to investigate cases of enforced disappearance by invoking Ordinance No. 06-01 and has repeatedly told the Committee that the submission of a series of individual communications to the Committee could be an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. This argument should be firmly rejected. I believe that, unless the Committee makes it clear to Algeria that it must strictly apply article 2, paragraph 2, of the Covenant and thus adopt and adapt its legislation to provide an effective remedy for every case brought before the Committee in communications relating to offences that have gone unpunished as a result of the application of Ordinance 06-01, those who cannot obtain justice or learn the truth because of the obstacles so crudely thrown up by the existence and application of the Ordinance will continue to be doubly victimized. Unless the Committee is more forceful in demanding the general abrogation of article 45 of Ordinance No. 06-01, the Covenant’s guarantee of an effective remedy to ensure the prevention, investigation and punishment of the serious human rights violations addressed repeatedly by the Committee in the present and other communications^a will continue to be locked in a cycle of ineffectiveness.

8. As regards the section on remedies, there is an urgent need for the Committee to make a clear recommendation based on the *iura novit curia* principle, to ensure that Algeria fulfils its general obligation to bring its legislation into line with article 2, paragraph 2, so as to give effect to the remedy provided for in article 2, paragraph 3, of the Covenant in respect of the outrageous article of Ordinance No. 06-01 that imposes a prison term on anyone with the temerity to report and seek an investigation into violations of the human rights of their tortured, executed or disappeared family members. In the present and in earlier similar communications, the Committee should have been more forceful in upholding the human right to seek a remedy and access to justice, as the *sine qua non* for preventing similar violations from taking place in Algeria. The obligation to avoid repetition requires this. The plight of victims and their families who are powerless to report human rights violations should inspire a crusade against impunity in the context of the recognition of the right to an effective remedy regardless of the circumstances in which the violations took place.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

^a Communications Nos. 1196/2003, *Boucherf v. Algeria*; 1588/2007, *Benaziza v. Algeria*; 1781/2008, *Djebrouni v. Algeria*, para. 8.2; 1905/2009, *Ouaghliissi v. Algeria*; 1807/2008, *Mechani v. Algeria*; and 1791/2008, *Sahbi v. Algeria*.

**S. Communication No. 1807/2008, *Mechani v. Algeria*
(Views adopted on 22 March 2013, 107th session)***

<i>Submitted by:</i>	Slimane Mechani (represented by counsel, Collectif des Familles de Disparu(e)s en Algérie (Collective of Families of the Disappeared in Algeria))
<i>Alleged victims:</i>	Farid Mechani (the author's son) and the author himself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	30 June 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, right of all persons deprived of their liberty to be treated with humanity and dignity, right to a fair trial, recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	Arts. 2, para. 3; 7; 9, paras. 1–4; 10, 14 and 16
<i>Article of the Optional Protocol:</i>	Art. 5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2013,

Having concluded its consideration of communication No. 1807/2008, submitted to the Human Rights Committee by Slimane Mechani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid, did not participate in the examination of the communication.

The text of an individual opinion by Committee member Mr. Victor Manuel Rodríguez-Rescia is appended to the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 30 June 2008, is Slimane Mechani, an Algerian national born on 18 August 1937. The author claims that his son, Farid Mechani, an Algerian national born on 5 February 1965, is the victim of violations by Algeria of articles 2, paragraph 3; 7; 9; 10; 14; and 16 of the International Covenant on Civil and Political Rights. The author claims that he himself is the victim of violations of articles 2, paragraph 3, and 7 of the Covenant. He is represented by the Collectif des Familles de Disparu(e)s en Algérie (Collective of Families of the Disappeared in Algeria).

1.2 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the case separately.

The facts as presented by the author

2.1 At 11.15 a.m. on Sunday, 16 May 1993, Farid Mechani was returning home after running an errand. However, he did not manage to get home. He was stopped very near to his home, at the corner of the rue Sainte Claire Deville and the no-through road in Hussein Dey, Algiers, by six plain-clothed police officers who arrived at great speed in two vehicles, a Peugeot 205 and Peugeot J5-type van. The officers said they were from the *daira* (subprefecture) police department¹ in Hussein Dey and were acting on the orders of Divisional Commissioner R.G. and Commissioner D.F. The police jumped on Farid Mechani, who tried to ask why he was being arrested but the only answer he received was to be pushed violently into the van. He was arrested in the presence of his mother and neighbours, no warrant was produced nor was any reason given for his arrest. A few minutes after Farid Mechani's arrest, the same police officers appeared again and headed toward the house of a neighbour, S.B. Finding that S.B. was not at home, the officers went to his father's shop, but he was not there either, so they took his brother M.B. instead. As soon as he learned what had happened, S.B. reported to the 14th district police station and was arrested. His brother M.B. was only released three days later. When he left the police station, M.B. went to see Farid Mechani's parents to tell them that their son had been at the 14th district police station. He told the family that he had heard Farid Mechani's voice several times from a neighbouring cell, and that he had been called by a police officer on the second day of his detention. M.B. had not heard his voice after that.²

2.2 After hearing M.B.'s statement, Slimane Mechani learned that his son Farid Mechani had been arrested because of a denunciation by a neighbour, a certain L.A.B., a watchman at the youth centre, which had been the target of a bomb attack; shortly before the arrest, he had been questioned as to how the perpetrators had been able to enter the office of the director of the youth centre. L.A.B. had allegedly admitted having facilitated the attack and denounced Farid Mechani as an active member of the Islamic Salvation Front and the "brains" behind the operation, in which two other people had also allegedly participated. The statements by L.A.B., presumably obtained under torture, are noted in the minutes of a police report of 23 May 1993.

¹ The *daira* police department is a territorial structure at the level of the subprefecture which has authority over the criminal investigation units and police stations in the subprefecture.

² The testimony, annexed to the communication, of the mother of a fellow prisoner indicates that Farid Mechani and two other prisoners were allegedly tortured at Hussein Dey police station for several days and then brought before the investigating judge, before being finally transferred to El Harrach prison in Algiers, where they were separated on arrival.

2.3 The same report mentions that Farid Mechani is a “fugitive”. On 1 June 1993, the author learned that his son had been summoned before the investigating judge for “setting up an armed terrorist group and endangering State security” but he had failed to appear. He was therefore declared a fugitive and a warrant was issued for his arrest. The report also mentioned that Farid Mechani had close links with a certain A.D., who was accused of setting up an armed terrorist group.³ A.D., however, states that he has neither seen nor met with Farid Mechani.

2.4 The author went each day to the 14th district police station, where the police systematically denied that Farid Mechani was there. In a telephone interview granted by the Director of Judicial Affairs on 25 September 1993, the author learned that Farid Mechani had been handed over to the military police on 17 May 1993, that is, the day after his arrest. The Director of Judicial Affairs said he had received that information from the chief prosecutor of the Algiers prosecution service. According to the author, it is therefore certain that Farid Mechani was arrested and held in custody at the 14th district police station for the first two days after his arrest. This agrees with the account of one of his fellow prisoners, M.B., who explained to the family that he had heard Farid Mechani’s voice during the first two days of his detention (see para. 2.1).

2.5 Slimane Mechani instructed a lawyer, who found Farid Mechani’s case-file at Bab-el-Oued Special Court.⁴ On 22 August 1993, more than three months after the police arrested him, Farid Mechani was summoned by the chief prosecutor to Bab-el-Oued Special Court for the review chamber to rule on the charges against him. The author then asked to meet the prosecutor to explain that he had received no information on his son’s fate since his arrest on 16 May 1993. However, the prosecutor refused to receive him. It is impossible to know whether Farid Mechani was finally brought before the investigating judge or the prosecutor.

2.6 According to the committal order issued by the review chamber on 6 September 1993, Farid Mechani was accused, along with six other defendants, of being a leader and founder of the armed group that committed the attempted attack. No information in respect of the hearing or any confrontation with witnesses that may have taken place is included in the document. The charges are based solely on the testimony of L.A.B. (see para. 2.2), who was also a defendant in the case and informed on his co-defendants; he was eventually released.

2.7 On 31 October 1993, the Mechani family received a threatening letter from the Organisation des jeunes Algériens libres (Organization of Young Free Algerians), warning them: “Your son Farid is a terrorist. His crimes have bereaved many innocent families. By remaining silent and helping him, you are supporting terrorism ... From now on, pay attention to your lives, the lives of your loved ones and your property. We will take action very soon.”

³ The author submits that A.D., after having been tortured and subjected to many years of court proceedings, as well as seven months of arbitrary detention, was released, rearrested and then finally declared innocent and released in 1995.

⁴ In its article 11, legislative decree No. 92-03 of 30 September 1992 on combating subversion and terrorism established three “special courts” to hear cases involving offences under chapter 1 of the decree, that is, “subversive or terrorist” acts. Five anonymous judges, appointed by a non-publishable presidential decree (art. 17 of the Decree), sat on the special courts. Publication of the identity of judges attached to a special court is punishable by a term of imprisonment of 2–5 years. According to the authors, between February 1993 and June 1994, the special courts tried more than 10,000 people and handed down 1,127 death sentences.

2.8 On 4 May 1994, Farid Mechani was tried in absentia by Bab-el-Oued Special Court, composed of anonymous judges, sentenced to life imprisonment for “endangering State security and conspiracy” and “membership of a criminal association that has the aim of causing violence and debasing the State”, and declared a “fugitive”. Farid Mechani’s family would never receive any more news of their son, who is still missing.

2.9 The author argues that he has never stopped looking for his son, submitting appeals to obtain justice for his son and learn the truth about his disappearance. He went to the Hussein Dey police station the day after the arrest and on numerous subsequent occasions. The police officers consistently denied that Farid Mechani was there, although he had been arrested by officers from that police station, in the presence of several witnesses. With regard to administrative remedies, on 11 June 1993, the author sent a letter to the Wali (prefect) of Algiers, asking him to intervene with the Hussein Dey police station which was holding Farid. The same day, he wrote a letter to the Chairperson of the Ligue des Droits de l’Homme (Human Rights League). On 3 July 1993, through the lawyer he had retained, he contacted the Chairperson of the National Observatory for Human Rights to denounce the “illegal detention” of Farid Mechani. On 8 March 2003, the author submitted an appeal to the National Commission for the Protection and Promotion of Human Rights (successor to the Observatory). The petition remains unanswered. On 22 September 2004, he compiled a case-file (“registration card”) for the ad hoc commission on disappearances set up by the Government. No inquiry was conducted into Farid Mechani’s fate as a result of that submission.⁵ The author approached the ad hoc commission once again and, on 8 February 2006, it finally acknowledged receipt of the case-file on Farid Mechani.

2.10 The author retained a lawyer to defend his son’s rights. After receiving a summons on 22 August 1993 for his son to report to the chief prosecutor at Bab-el-Oued Special Court, the author himself reported to the court to request a hearing with the chief prosecutor, who refused to receive him. On 7 September 1993, he then lodged a complaint with the chief prosecutor at the Algiers Special Court based in Bab-el-Oued, informing him of the circumstances of Farid Mechani’s arrest and calling, *inter alia*, for his son to be brought before the court. That appeal remains unanswered.

2.11 On 21 September 1993, the author appealed to the Director of Judicial Affairs of the Ministry of Justice, denouncing the illegal detention of his son. A few days later he learned from the Director that Farid Mechani had been handed over to the military police the day after his arrest.

2.12 On 26 September 1993, the author submitted a complaint to the Minister of the Interior, the Prime Minister and the Chairman of the High Council of State, informing them of the circumstances surrounding his son’s arrest and denouncing his unlawful detention. He never received a reply.

2.13 The case of Farid Mechani was transmitted to the Working Group on Enforced or Involuntary Disappearances on 7 March 2003.

2.14 The author argues that the long silence that has met all the steps he has taken over the past 14 years⁶ concerning his son’s disappearance, despite the complaints he has submitted, has deprived him of the enjoyment of his right to an effective remedy which should have allowed him to obtain at least the opening of an investigation. He adds that the adoption by referendum on 29 September 2005 of the Charter for Peace and National Reconciliation and its implementing legislation, which came into force on 28 February 2006, rules out the possibility that any effective and available domestic remedies exist in

⁵ The author adds that the ad hoc commission never published its final report.

⁶ Nearly 20 years at the time of consideration of the communication by the Committee.

Algeria to which the families of victims of disappearance could have recourse. He believes that ordinance No. 06-01 of 27 February 2006 enacting the Charter⁷ precludes any possibility of legal action against agents of the State, providing in its article 45 for the inadmissibility of any proceedings brought “against individuals or groups who are members of any branch of Algeria’s defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions. Any allegation or complaint shall be declared inadmissible by the competent legal authority.” Since its entry into force on 28 February 2006, the ordinance of 27 February 2006 has prevented any possibility of legal remedy. The author therefore argues that, as the steps he has taken have proved futile and, in the absence of effective remedies, no investigation has been conducted,⁸ he is, under article 45 of ordinance No. 06-01, deprived of any redress, as he is legally unable to bring action or lodge a simple appeal. He also claims, in the light of the new legislation in Algeria, that there is no longer any remedy within the meaning of article 2, paragraph 3, of the International Covenant on Civil and Political Rights available to the families of the victims of enforced disappearances.⁹ The author therefore argues that he has exhausted all possible remedies and that it is impossible for him to take any legal proceedings in the State party for the reasons mentioned.

The complaint

3.1 The author, referring to the definition of enforced disappearance given in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and to the Committee’s jurisprudence,¹⁰ invokes in the first place article 7 of the Covenant, in that the circumstances surrounding the disappearance of Farid Mechani, as well as the testimony of his fellow prisoners, demonstrate that he was tortured or subjected to cruel and inhuman treatment after his disappearance. In addition, the author contends that the very fact of being subjected to disappearance of itself constitutes inhuman or degrading treatment with regard to the victim.¹¹ The author, referring to the Committee’s jurisprudence,¹² expresses his own feelings of despair and injustice at the authorities’ denial that they were holding his son, although he had been arrested a few days previously in front of witnesses by those same authorities. Since his son’s arrest, the author has not been able to live a normal life, as he is constantly wondering where his son is, and why and how the authorities made him disappear. He lives in the expectation of and anguish at the idea of dying without seeing his son again. For these reasons, the author claims to be a direct victim of a violation of article 7 of the Covenant.

3.2 The author also invokes article 9 of the Covenant, arguing that Farid Mechani was arrested by the security forces on 16 May 1993 and his family has not seen him since. However, the authorities denied from the beginning that he was being held, although he had been arrested and detained in front of witnesses. The Algerian authorities have never explained why they declared Farid Mechani a “fugitive” and tried him in absentia on 4 May 1994, when he was probably being held by the security services. According to the author, the fact that his detention was not acknowledged, that it was totally devoid of the

⁷ Ordinance No. 06-01 of 28 Moharram 1427 (27 February 2006) enacting the Charter for Peace and National Reconciliation, *Official Gazette* No. 11 of 28 February 2006.

⁸ Communication No. 147/1983, *Arzuada Gilboa v. Uruguay*, Views adopted on 1 November 1985.

⁹ Committee’s concluding observations of 1 November 2007 following its consideration of the third periodic report submitted by Algeria (CCPR/C/DZA/CO/3, paras. 7–18).

¹⁰ Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3.

¹¹ See, inter alia, communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996.

¹² See, inter alia, communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007. Concluding observations on Algeria (CCPR/C/79/Add.95, 18 August 1998, para. 10).

safeguards prescribed by article 9 and that the investigations lacked the effective and efficient character required in such circumstances means that Farid Mechani was arbitrarily deprived of his liberty and security, in violation of article 9, as well as of the protection afforded by the guarantees set forth in that article.¹³

3.3 The author also invokes article 10 of the Covenant, in that the conditions in which Farid Mechani was held, without being able to receive the visit of a lawyer or a family member, cannot be qualified as humane. Held incommunicado and therefore without any link to the outside world, the conditions in which he was detained were conducive to ill-treatment, in violation of his rights to be treated with humanity and with respect for the inherent dignity of his person.

3.4 The author also claims a violation of article 14 of the Covenant, alleging that his son, Farid Mechani, was deprived of his right to a fair trial, having been tried in absentia and sentenced by Bab-el-Oued Special Court on 4 May 1994, after an unfair trial, held in camera, in the absence of his family. Although his lawyer was present at the trial, she was unable to speak on behalf of her client, whom she has never been able to see.¹⁴ Farid Mechani was sentenced to life imprisonment for endangering State security, conspiracy and membership of a criminal association that has the aim of causing violence and debasing the State, even though he had never officially been heard by the investigating judge. He was furthermore declared a “fugitive” and a warrant was issued for his arrest although, according to the testimony of his fellow prisoners, he had been detained in Hussein Dey police station and then transferred to El Harrach prison.

3.5 The author also invokes article 16 of the Covenant, noting that the Algerian authorities denied Farid Mechani’s human rights, having exposed him to unacknowledged detention and thus denied him the protection of the law.

3.6 Finally, the author invokes article 2, paragraph 3, of the Covenant, alleging that his son, Farid Mechani, whose detention has not been acknowledged, has thus been deprived of his legitimate right to exercise an effective remedy. Not only have the authorities not carried out all the necessary investigations to shed light on the circumstances of his disappearance, identify the perpetrators and bring them to justice, but they have also denied being involved in Farid Mechani’s disappearance. Despite all the steps taken by the author, the State party has failed to fulfil its obligation to conduct a thorough and effective investigation into the disappearance and fate of Farid Mechani, to inform the author of the results of the investigation, to initiate criminal proceedings against those persons held responsible for his disappearance and to bring them to justice and punish them. The State party has thus made itself responsible for a violation of article 2, paragraph 3, of the Covenant.

3.7 In conclusion, the author repeats his request that the Committee should find that the State party has acted in violation of articles 2, paragraph 3; 7; 9; 10; 14; and 16 of the Covenant in respect of Farid Mechani, and articles 2, paragraph 3, and 7 of the Covenant in respect of the author himself. He also asks the Committee to request the State party to carry out urgent independent investigations to: (a) find Farid Mechani; (b) bring the perpetrators of this enforced disappearance before the appropriate civil authorities to be prosecuted; and (c) give Farid Mechani — if he is still alive — and his parents adequate, effective and prompt reparation for the harm suffered.

¹³ See, inter alia, communication No. 612/1995, *Arhuaco v. Colombia*, Views adopted on 29 July 1997.

¹⁴ The author adds that the practice in Algeria is for lawyers not to plead on behalf of persons being tried in absentia.

State party's observations on the admissibility of the communication

4.1 On 3 March 2009, the State party, in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation", contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period, the Government had to fight against groups that were not coordinated among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. On the basis of data recorded by a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the "national tragedy" would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political

or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements,¹⁵ the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed he did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to him. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.¹⁶

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that

¹⁵ As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the author of the present communication.

¹⁶ Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

contributed to the “national tragedy”, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of the Algerian defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of funds to compensate all victims of the “national tragedy”, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author’s allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on the admissibility of the communication

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that for none of the complaints or requests for information he submitted did the author use channels that would have allowed consideration of the case by the Algerian judicial authorities.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the author to submit his allegations to examination has so far

prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties towards the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

Author’s comments on the State party’s observations on admissibility

6.1 On 17 December 2012, the author submitted comments on the State party’s observations on admissibility. He first draws the Committee’s attention to the general nature of the State party’s response to the communication, which it has presented systematically for all the individual communications pending before the Committee since the Charter and its implementing legislation came into effect, without any mention of the specific aspects of the case or the remedies attempted by the victim’s family. Concerning the exhaustion of domestic remedies, the author, referring to his original communication, reiterates that he has submitted many appeals, all of which proved ineffective. Of the 15 judicial and non-judicial complaints lodged between 1993 and 2006, none resulted in a diligent investigation or criminal prosecution, although they concerned serious allegations of enforced disappearance.¹⁷ The author adds that the fact that the family has not sued for damages in criminal proceedings does not render the communication inadmissible, because that procedure is not an appropriate remedy.¹⁸ He recalls that he asked to meet the prosecutor at Bab-el-Oued Special Court to inform him of the disappearance of Farid Mechani since his arrest on 16 May 1993, but the prosecutor refused to receive him. He then petitioned the prosecutor on 7 September 1993 by registered letter, without any result. The author reiterates that ordinance No. 06-01 precludes any possibility of judicial action against State officials, by providing in its article 45 that any allegation or complaint against agents of the State shall automatically be declared inadmissible, meaning that no remedies against State officials are available to the victims of disappearance.¹⁹ The author therefore argues that article 45 of ordinance No. 06-01, which disregards the rights guaranteed by the Covenant, may not be invoked and that he has exhausted the domestic remedies available.

6.2 The author rejects the State party’s argument inviting the Committee to adopt a general approach to cases of enforced disappearance. According to him, such an approach would be incompatible with article 5 of the Optional Protocol, and rule 96 of the Committee’s rules of procedure. The fact that Farid Mechani disappeared in 1993 could not justify the loss of his right to have his communication examined by the Committee. The author further recalls that the Committee is concerned that provisions in the texts of the Charter seemed to promote impunity and infringe the right to an effective remedy and, in its concluding observations, has called the State party to inform the public of the right of private individuals to refer a matter to the Committee, pursuant to the Optional Protocol.²⁰ The author adds that the legislation implementing the Charter requires the families of

¹⁷ Communication No. 1781/2008, *Djebrouni and Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4.

¹⁸ See, inter alia, communication No. 1753/2008, *Guezout and Rakik v. Algeria*, Views adopted on 19 July 2012, para. 7.4.

¹⁹ See, inter alia, Committee’s Views in communication No. 1753/2008, *Guezout and Rakik v. Algeria*, as well as at its concluding observations on the periodic report of Algeria, CCPR/C/DZA/CO/3, para. 7 (a).

²⁰ CCPR/C/DZA/CO/3, para. 8.

disappeared persons to obtain a finding of presumed death in order to claim financial compensation. This procedure does not include any provision for the police or judicial authorities to carry out an effective investigation to ascertain the fate of the disappeared person. In these circumstances, the legislation implementing the Charter constitutes, in the author's view, an additional violation of the rights of the families of disappeared persons and is certainly not a satisfactory response to the problem of disappearances, which should be based on respect for the right to the truth, justice, full redress and the preservation of the memory of the events. The author therefore reiterates that the mechanism accompanying the Charter cannot thus be invoked in respect of victims who submit a communication to the Committee, and invites the Committee to declare his communication admissible.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Firstly, the Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.2 above) does not preclude their being considered separately by the Committee. The joining of the admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Farid Mechani was reported to the Working Group on Enforced or Involuntary Disappearances in 2003. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.²¹ Accordingly, the Committee considers that the examination of Farid Mechani's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since he did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee further notes that, according to the State party, the author has written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but has not actually initiated legal action and seen it through to its conclusion by availing himself of all available remedies of appeal and judicial review. The Committee notes to this effect that, subsequent to the chief prosecutor of Bab-el-Oued Special Court summoning Farid Mechani to appear on 22 August 1993, the author asked to meet with the prosecutor to inform him of his son's disappearance, but the prosecutor refused to receive him. Less than a month later, the author once again tried to appeal directly to the prosecutor, to no avail. Nearly four months

²¹ Communication No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 7.2; and communication No. 540/1993, *Celis Laureano v. Peru*, para. 7.1.

after Farid Mechani's disappearance, the author learned from the Ministry of Justice that he had been handed over to the military police. However, no case was ever brought and, despite the administrative and judicial remedies sought, the author has not obtained any information that might shed light on his son's fate. In addition, the Committee took note of the author's argument, according to which, since the entry into force of ordinance No. 06-01, the families of victims of enforced disappearances have found themselves deprived of the right to take part in court proceedings to shed light on the fate of their family member, as any such action would be liable to criminal prosecution.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.²² Although the author repeatedly contacted the competent authorities concerning his son's disappearance, the State party failed to conduct a thorough and effective investigation into Farid Mechani's disappearance, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient information indicating that an effective remedy is available de facto, while ordinance No. 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.²³ Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.²⁴ The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee considers that, for the purposes of admissibility of a communication, the author must exhaust only the effective remedies available in respect of the alleged violation, in this case, the effective remedies in respect of forced disappearance.

7.6 The Committee finds that the author has sufficiently substantiated his allegations insofar as they raise issues under articles 7, 9, 10, 14, 16 and 2, paragraph 3, of the Covenant, and therefore proceeds to consider the communication on its merits.

Consideration of merits

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party provided general and collective comments on the serious allegations made by the authors of such complaints, and has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance between 1993 and 1998 must be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual, and treat every individual with respect for the dignity that inheres in every human being. It further recalls its jurisprudence, according to which the State party may not invoke the

²² Communications No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 7.4; and No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

²³ CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

²⁴ Communications No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3; No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 7.4; and No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, para. 6.4.

provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee.²⁵ Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,²⁶ according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.²⁷ In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his son Farid Mechani was arrested at his home on 16 May 1993 by six plain-clothed police officers, and then taken to the 14th district police station. The author presented himself to the Hussein Dey police station the day after his son's arrest, and on numerous subsequent occasions, and the police consistently denied that Farid Mechani was there. The family subsequently lodged administrative complaints with the Wali of Algiers, the National Observatory for Human Rights and its successor, the National Commission for the Protection and Promotion of Human Rights. The victim's family also lodged a complaint with the chief prosecutor at Algiers Special Court in Bab-el-Oued to clarify the fate of their son, but none of the steps taken since then has helped to shed light on the fate of Farid Mechani, who has not been seen since that day. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment,²⁸ which recommends that States parties should make provision against incommunicado detention. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Farid Mechani.²⁹

8.5 The Committee also takes note of the anguish and distress caused to the author by Farid Mechani's disappearance. It considers that the facts before it disclose a violation with regard to him of article 7 of the Covenant.³⁰

²⁵ Communications No. 1196/2003, *Boucherf v. Algeria*, para. 11; No. 1588/2007, *Benaziza v. Algeria*, para. 9.2; No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.2; and No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, para. 7.2.

²⁶ Communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; and No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.3.

²⁷ Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

²⁸ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

²⁹ Communications No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, para. 7.5; No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.5; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted 11 July 2007, para. 6.5; and No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2011, para. 8.5.

³⁰ Communications No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, para. 7.6; No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.6; No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, para.

8.6 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Farid Mechani was arrested on 16 May 1993 by plain-clothed police officers, in the presence of his mother and neighbours, without a warrant being produced, or the reason for his arrest being disclosed; that, following his arrest, he was detained at the 14th district police station, and then, according to information obtained later by the family, was allegedly handed over to the military police the day after his arrest; Farid Mechani disappeared when he was arrested, and thus was not brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention, and no official information was given to his family concerning his whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with regard to Farid Mechani.³¹

8.7 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Farid Mechani's incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.³²

8.8 The author invokes article 14 of the Covenant, as Farid Mechani was tried in absentia and sentenced by Bab-el-Oued Special Court on 4 May 1994, after an unfair trial held in the absence of his family and without his lawyer being able to speak on his behalf, as she had never been able to see her client. The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,³³ in which it noted that the proceedings of special tribunals of "faceless judges" are often irregular, not only because the identity and status of the judges are not made known to the accused persons, but often also because of irregularities in the procedure.³⁴ In the present case, Farid Mechani was sentenced to life imprisonment after a closed trial, by a court of special jurisdiction made up of anonymous judges, and without ever being heard, as he had been a victim of enforced disappearance since his arrest a year previously. The authorities of the State party tried Farid Mechani in absentia, while he had probably been held in incommunicado detention for a year, without any investigation being conducted to establish his fate, nor any information about him being communicated to his family. In these circumstances, and in the absence of information from the State party, the Committee is of the opinion that the trial and conviction of Farid Mechani are inherently unfair and, in multiple respects, disclose a violation of article 14, paragraph 1, of the Covenant.³⁵

7.5; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, View adopted on 24 October 2007, para. 6.11.

³¹ Communications No. 1905/2009, *Ouaghliissi and Khirani v. Algeria*, para. 7.7; and No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.7.

³² General comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3, and communications No. 1780/2008, *Aouabdia and Zarzi v. Algeria*, Views adopted 22 March 2011, para. 7.8; and No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

³³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 23.

³⁴ Communication No. 1298/2004, *Becerra Barney v. Colombia*, Views adopted on 11 July 2006, para. 7.2.

³⁵ Communications No. 1751/2008, *Aboussedra et al. v. Libyan Arab Jamahiriya*, Views adopted on 25 October 2010, para. 7.8; and No. 1782/2008, *Aboufaied v. Libya*, Views adopted on 21 March 2012, para. 7.9.

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.³⁶ In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate or whereabouts of Farid Mechani, despite the multiple requests addressed by the author to the State party. The Committee concludes that Farid Mechani's enforced disappearance nearly 20 years ago denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,³⁷ according to which the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities, including the judicial authorities, concerning Farid Mechani's disappearance, all their efforts led to nothing and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son, although he was arrested by officials of the State party, and he disappeared from a police station. Furthermore, the absence of the legal right to initiate judicial proceedings since the promulgation of ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Farid Mechani and the author of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.³⁸ The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with articles 7, 9, 10, 14 and 16 of the Covenant with regard to Farid Mechani, and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7, 9, 10, 14, 16 and article 2, paragraph 3, read in conjunction with articles 7, 9, 10, 14 and 16 of the Covenant, with regard to Farid Mechani. It also finds a violation of article 7 and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Farid Mechani; (b) providing the author with detailed information about the results of its

³⁶ Communications No. 1905/2009, *Ouaghlissi and Khirani v. Algeria*, para. 7.8; No. 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.8; No. 1780/2008, *Aouabdia and Zarzi v. Algeria*, para. 7.9; No. 1588/2007, *Benaziza v. Algeria*, para. 9.8; No. 1327/2004, *Grioua v. Algeria*, para. 7.8; and No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

³⁷ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

³⁸ CCPR/C/DZA/CO/3, para. 7.

investigation; (c) releasing Farid Mechani immediately if he is still being detained incommunicado; (d) in the event that Farid Mechani is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Farid Mechani, if he is still alive. Notwithstanding the terms of ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the present report.]

Appendix

Partly dissenting opinion of Committee member Mr. Víctor Rodríguez Rescia

1. Regarding communication No. 1807/2008, I agree with the decision of the Human Rights Committee to find violations of the rights set out in articles 7, 9, 10, 14, 16 and 2, paragraph 3, read in conjunction with articles 7, 9, 10, 14 and 16 of the Covenant, with regard to Farid Mechani, and of articles 7 and 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.

2. However, I believe that the Committee underestimates the effects of the existence and application in this particular case of the relevant parts (specifically, arts. 45- 46) of Ordinance No. 06-01 of 27 February 2006, implementing the Charter for Peace and National Reconciliation. The Charter, which was adopted by referendum on 29 September 2005, prohibits the taking of any legal action against members of the Algerian defence and security services for the offences of torture, extrajudicial killings and enforced disappearances. The provisions of article 45 of the Ordinance clearly impede access to justice and afford complete impunity by declaring the inadmissibility of any legal proceedings brought against “individuals or groups who are members of any branch of Algeria’s defence and security forces for actions undertaken to protect persons and property, safeguard the nation or preserve the institutions of the People’s Democratic Republic of Algeria”, stipulating that “any allegation or complaint shall be declared inadmissible by the competent legal authority”. As if this prohibition were not enough, the Ordinance establishes that anyone submitting such an allegation or complaint is liable to a penalty of 3 to 5 years’ imprisonment and a fine of 250,000 to 500,000 Algerian dinars.

3. While the Committee has recognized, in this communication and on earlier occasions, that Ordinance No. 06-01 continues to be implemented despite the Committee’s recommendations that it be brought into line with the Covenant,^a and has recalled its jurisprudence whereby the State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or might submit communications to the Committee,^b the remedial effects of implementing the Ordinance are weak and fail to convey to the country a clear message of anti-impunity.

4. In my view, the Committee has missed an opportunity to declare explicitly that Ordinance No. 06-01 should have no bearing either on this communication or on any other past or future cases. The Committee decided that, “notwithstanding the terms of ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances ... [and that] the State party is also under an obligation to prevent similar violations in the future”. Instead of saying this, the Committee should have made a clearer and more forceful statement valid *erga omnes*. It should have stated that the very existence of the Ordinance contravenes article 2, paragraph 3, of the Covenant and that, in accordance with article 2, paragraph 2, of the Covenant, the State party must amend its national legislation to render articles 45 and 46 of the Ordinance inapplicable.

^a CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

^b Communications Nos. 1196/2003, *Boucherf v. Algeria*, para. 11; 1588/2007, *Benaziza v. Algeria*, para. 9.2; 1781/2008, *Djebrouni and Berzig v. Algeria*, para. 8.2; and 1905/2009, *Ouaghlissi and Khirani v. Algeria*, para. 7.2.

5. Such a general ruling would have rendered moot many of the cases brought before the Committee for violations similar to those in the present communication and, as far as the lack of an effective remedy is concerned (Covenant, art. 2, para. 3), would have allowed them to be dealt with as a group. For those who have suffered as a result of the failure to investigate serious human rights violations, it is an unnecessary burden to have to submit their cases separately, when a general statement could have settled the matter of the non-applicability of Ordinance No. 06-01 in any future cases. Accordingly, the Committee should have stated that Algeria, in accordance with article 2, paragraph 2, of the Covenant should, “where not already provided for by existing legislative or other measures, ... take the necessary steps, in accordance with its constitutional processes and with the provisions of the ... Covenant, to adopt *such laws or other measures* as may be necessary to give effect to the rights recognized in the ... Covenant” (emphasis added).

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**T. Communication No. 1821/2008, *Weiss v. Austria*
(Views adopted on 24 October 2012, 106th session)***

<i>Submitted by:</i>	Sholam Weiss (represented by Jonathan Cooper)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Austria
<i>Date of communication:</i>	12 May 2008 (initial submission)
<i>Subject matter:</i>	Extradition to a country where the person faces life imprisonment
<i>Procedural issue:</i>	Victim status, admissibility <i>ratione loci</i> and exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to appeal and inhumane and degrading treatment linked to the duration and disproportionality of a sentence
<i>Articles of the Covenant:</i>	7 and 14, paragraph 5
<i>Articles of the Optional Protocol:</i>	1 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2012

Having concluded its consideration of communication No. 1821/2008, submitted to the Human Rights Committee by Mr. Sholam Weiss under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 12 May 2008, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. He claims that by extraditing him to the United States, where he would not be entitled to appeal his life sentence, Austria has violated article 7 and article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The author is represented by Jonathan Cooper.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Gerald L. Neuman did not participate in the adoption of the present Views.

¹ The Covenant and the Optional Protocol entered into force for Austria on 10 December 1978 and on 10 March 1988 respectively.

1.2 On 3 April 2003, the Committee adopted its Views in relation to communication No. 1086/2002, submitted by the author, in which he claimed, inter alia, that his extradition to the United States violated the above provisions of the Covenant, as his conviction there was pronounced and his sentence imposed in absentia and he had no effective opportunity to appeal against them. On the basis of the information before it, the Committee considered that since conviction and sentence in the United States had not yet become final, it was premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant. The Committee did find a violation, however, of article 14, paragraph 1, taken together with article 2, paragraph 3, since the extradition had been carried out in breach of a stay issued by the Austrian administrative court and the author had been deprived of his right to appeal an adverse decision of the Austrian Upper Regional Court. The Committee concluded that the State party was under an obligation to make such representations to the United States authorities as might be required to ensure that the author did not suffer any consequential breaches of his rights under the Covenant which would flow from the State party's extradition of the author in violation of its obligations under the Covenant.²

1.3 In the present communication, the author reiterates his claims, not addressed by the Committee in its Views on communication 1086/2002, that his extradition involved violations of articles 7 and 14, paragraph 5, of the Covenant, and alleges that, in view of the proceedings in the United States, these claims are no longer based on hypothetical facts.

Factual background

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering.³ He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him in absentia on 18 February 2000 to 845 years' imprisonment (with the possibility of a reduction to 711 years and pecuniary penalties in excess of US\$ 248 million).

2.2 The author's counsel lodged a notice of appeal within the 10-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000, the United States submitted a request to the State party for the author's extradition. The author claims that, in response, the State party requested assurances from the United States, under articles 9 and 11 of the Extradition Treaty

² Communication No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, para. 11.1.

³ In its Memorandum Opinion of the United States District Court, Middle District of Florida, Ocala Division of 15 December 2008, provided by the State party in its observation of 30 January 2009, the judge mentions that the author was charged with violating numerous counts of the Racketeer Influence and Corrupt Organization (RICO) Act, money laundering and other offences arising out of the failure of National Heritage Life Insurance Co.

between the two countries, that following extradition, the author would be given the right to a full appeal of his sentence and conviction. He indicates that, by letters dated 8 February and 14 May 2002, the United States provided the State party with assurances that if the author was extradited with Austria denying one or more criminal counts on which the applicant was convicted, the presiding United States judge would be required, on the condition of the Rule of Specialty, to re-sentence him, and that a re-sentencing would permit him to appeal both his sentence and conviction. The assurances, contained in the letter dated 14 May 2002, were drafted as follows:

(1) Assurance on U.S. Law: "If Weiss is extradited subject to the condition that he not be punished for offenses involving false statements to government officials or in judicial proceedings, the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition."

(2) Assurance by Expert Opinion, based on assurance # 3 regarding US law: "In our opinion, this would result in Weiss being permitted to file a full appeal on all issues, including the guilty verdict, errors committed during the trial, constitutional issues, and his sentence."

(3) Assurance on U.S. Law: "Under United States law, a defendant does not separately appeal his verdict and a sentence. Any appeal is from the final judgment, which contains both the finding of guilt and the imposition of punishment."

(4) Assurance on future U.S. actions in court: "Furthermore, in any proceedings before any United States court, the United States would take the position that the re-sentencing permits Weiss to appeal both the sentence and the guilty verdict."

2.4 On 8 May 2002, the Austrian Upper Regional Court, upon reconsideration, found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (so-called Count 93 in the agreement, for which the author had been sentenced to 10 years' imprisonment), on the basis that no corresponding crime exists in Austria.

2.5 In its ruling, the Austrian Upper Regional Court further considered that according to the case-law of the European Court of Human Rights, extradition to a country where a person faces a life sentence without parole could raise issues under article 3 of the European Convention on Human Rights. The Court continues by stating that at the time of the ruling, however, the European Court of Human Rights had never come to the conclusion that a life sentence without parole was in itself a violation of article 3 of the Convention. The Court stated that on the basis of the note of the United States Department of Justice dated 26 June 2001, the author would have the possibility to appeal the United States judgment and to ask for a new trial on the grounds that he had not been present when he was sentenced. According to the same note, if successful, the author would be retried. The Court decided that it was not certain that the author would be serving a life sentence without parole and therefore, the factual implementation of his life sentence was not confirmed. The Court concluded that article 3 of the Convention would not be violated were the author to be extradited. The Court then assessed whether article 3 of the Convention could also be relevant if a person would be extradited to a country where his conditions of detention were to be incompatible with article 3 of the Convention. The Court considered that neither the general information available nor facts of the case indicated that

the author would undergo treatment in the United States incompatible with article 3 of the Convention.⁴

2.6 On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, which took place on 9 June 2002.

2.7 The author states that the Austrian Ministry of Justice, in a legal brief to the Austrian Administrative Court submitted on 6 June 2002, declared that the United States letters were "binding international declarations". The brief specified, *inter alia*, that "since execution of the part of the verdict concerning Count 93 is not possible in the United States (...) a resentencing must take place there upon petition of the Government, which re-sentencing would have to refer to all counts because of the interconnectedness of the facts". It also indicated that if the author was extradited he would "be entitled to an unlimited appeal, since separate appeals against verdict and guilt are not admissible with regard to a final judgment".

2.8 Following the author's extradition, the United States Government filed a motion with the Middle District Court of Florida (Orlando Division) to re-sentence the author in accordance with the order under which he was extradited from Austria (Rule of Specialty). Specifically, the United States Government requested that the Court re-sentence the author on all counts of conviction except Count 93, which alleged obstruction of justice. On 15 August 2002, the Court denied the United States Government's motion, ruling that the case was different from the vast majority of cases applying the rule of specialty to an extradition as, in all but rare cases, extradition occurs before trial, and the rule of specialty controls the charges for which the requesting State may prosecute a defendant. The Court ruled that a sentence was not alterable at the will of the Government, in accordance with the principle of separation of powers, and that the latter had not cited any authority which would provide the Court the power to modify the author's sentence. It added that the rule of specialty was being asserted by the Government, not to limit the offences for which the author can be prosecuted but rather to modify a valid judgement of the Court. The circumstances under which a district court may modify or vacate a sentence were strictly limited by statute and the Federal Rules of Criminal Procedure which did not encompass the circumstances of the present case. The Court also referred to earlier United States jurisprudence related to extradition confirming that re-sentencing was prohibited under the constitutional doctrine of separation of powers.

2.9 On 29 August 2002, the United States Government filed a Notice of Appeal to the United States Circuit Court of Appeals for the Eleventh Circuit. On 10 October 2002, the United States Government filed a motion to stay appeal proceedings in the Eleventh Circuit pending authorization from the United States Department of Justice Solicitor General to appeal the judge's decision of 15 August 2002. On 23 December 2002, the United States Government filed a "motion to dismiss with prejudice" in the Eleventh Circuit, indicating that the Solicitor General did not give authorization to appeal the judge's decision. On 8 January 2003, the Eleventh Circuit Court of Appeals granted the Government's motion, dismissing the appeal "with prejudice" and making the judge's decision final.

2.10 Having been barred from the appeal process that was assured by the United States authorities to the State party authorities, the author initiated what is known as a 2241 habeas corpus petition in the District Court for the Central District of Florida, claiming that the United States had violated its treaty obligations to Austria since it had failed to provide him with an appeal of his conviction and sentence upon his return to the United States. He claimed that the United States had deliberately misled the Austrian authorities to believe

⁴ See Judgment of the Austrian Upper Regional Court of 8 May 2002, p. 27.

that, in addition to vacating the sentence on Count 93, the author would be re-sentenced and permitted a full appeal of his criminal conviction and new sentence. Accordingly, the United States had violated the Rule of Specialty. These proceedings are an entirely new cause of action within the United States and were pending at the time of submission of the present communication.

The complaint

3.1 In communication No. 1086/2002, the author claimed, *inter alia*, that his extradition to the United States violated article 14, paragraph 5 in so far as he would not be able to appeal either his conviction or his sentence passed in absentia. The author had also argued that his extradition violated his rights under article 7 as he would be facing 845 years in prison as a consequence of his sentence, which would amount to inhuman and degrading treatment. The author noted in this regard that the Minister of Justice eventually allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.⁵

3.2 The author remarks that in its Views, the Committee opted not to examine these two aspects of the author's claim on the grounds that to do so would be hypothetical exercises. The Committee made this decision on the basis of the United States assurances received by the State party.

3.3 Following the author's extradition, the State party failed to ascertain properly the validity of the assurances provided by the United States. Whilst his sentence, for technical reasons has, or will be, reduced to 711 years, the author has been unable to appeal against it, or his conviction. In failing to ensure the validity of the assurances received, the State party has denied the author his appeal rights. Moreover, the author considers that to return him to life imprisonment without the prospect of parole for a property crime amounts to inhuman and degrading treatment and punishment, in violation of article 7 of the Covenant.

3.4 As a remedy, the author demands that the Committee request the State party to call for the authorities in the United States to provide him with an effective appeal of both conviction and sentence; and that in the alternative, the State party calls for the return of the author to its jurisdiction and for the extradition process to be recommenced in line with the State party's obligations under the Covenant.

State party's observations on admissibility and merits

4.1 On 30 January 2009, the State party provided its observations on admissibility and merits. It states that, according to the information at its disposal, the author has so far not expressed in the proceedings in the United States his unconditional agreement to the effect that the prison term imposed upon him is reduced by the portion that relates to Count 93 ("perjury while a defendant"). However, it was only in connection with this count that the Austrian court and the Austrian Federal Ministry of Justice declared the extradition to be inadmissible. Rather, the author is said to have challenged directly the lawfulness of his extradition in its entirety in the United States and to have maintained that the United States

⁵ The author provides the terms of the Treaty, which states: "Convictions in absentia. If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

obtained his extradition by devious means.⁶ The State party considers that Austria is neither a party nor a party concerned in the proceedings conducted in connection with the author in the United States.

4.2 The author maintains that the letters of the United States Department of Justice dated 8 February 2002 and 14 May 2002 would have guaranteed him, without any further requirements, a full appeal and new proceedings. The State party interprets these letters differently. The United States Department of Justice only stated, against the background of the Rule of Specialty, that in the event that extradition for the enforcement of the sentence is not granted for certain parts, the sentence will be lowered. The author can still take legal remedies⁷ under the American legal system against such lowering of the sentence, which might subsequently also give him the right to obtain a full appeal and new proceedings in the criminal matter altogether. The State party refers in this respect to paragraph 9.3 of the Committee's Views in relation to communication No. 1086/2002.

4.3 The State party underlines that it has repeatedly asked its United States counterpart to comply with the obligations under international law concerning the applicability of the Rule of Specialty by concluding the still pending American proceedings. According to the Memorandum Opinion of the United States District Court, Middle District of Florida, Ocala Division, of 15 December 2008, in relation to the habeas corpus proceedings initiated by the author against the United States,⁸ the court could amend the imposed sentence with a view to Count 93, which was declared inadmissible. However, this indicates that the proceedings to lower the sentence were still pending in the United States at the time of submission.

4.4 The State party submits that according to article 1 of the Optional Protocol, the Committee can receive and examine communications only with regard to persons who are subject to the jurisdiction of a State party to the Covenant and the Protocol and who maintain that they have been the victim of a violation of the rights, as recognized by the Covenant, by that State party. Since the proceedings to lower the sentence in the United States are still pending, the author is not a victim of a violation of the rights under the Covenant. Moreover, the present communication relates to the conduct of the United States, allegedly for not paying sufficient attention to the Rule of Specialty in connection with the author's extradition. The communication should therefore be declared inadmissible under article 1 of the Optional Protocol, in view of the fact that it is directed against the conduct of the United States.

4.5 The present communication calls for a re-examination of the case that was previously examined by the Committee in communication No. 1086/2002, and claims a violation of articles 7 and 14, paragraph 5. The Committee adopted its Views on 3 April 2002 and since that date, no change in the essential facts of the case has occurred. The communication is therefore inadmissible, as this is an adjudicated matter and there are no provisions in the Optional Protocol for new proceedings or for re-opening of cases already examined by the Committee.

4.6 With regard to the author's allegation that he is not in a position to challenge the continued violations of the Covenant before Austrian courts, the State party replies that it has fully complied with paragraph 11.1 of the Views in communication No. 1086/2002 in that it obtained the relevant statements by the competent United States authorities and courts and continues to obtain information on the proceedings pending in the United States

⁶ The author sought a writ of habeas corpus commanding that he be released from custody on the basis of the violation by the United States of the extradition treaty signed with Austria.

⁷ The State party does not mention the legal remedies he is referring to.

⁸ Case No. 5: 02-Ov-204-Oc-10 rj.

on an ongoing basis. Furthermore, the author is entitled to file actions for official liability in connection with his extradition, as the Austrian Administrative Court granted his complaint suspensive effect. However, he has not filed such actions. He therefore did not take all steps in order to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

4.7 The State party concludes that the communication should be declared inadmissible and that it reveals no violation of the Covenant.

Author's comments on the State party's observations

5.1 On 28 May 2009, the author submitted his comments to the State party's observations, which, in the author's opinion, do not address the substance of the communication.

5.2 With regard to admissibility, the author replies that the current communication is intimately linked to communication No. 1086/2002 and premised on the same facts, which satisfied the admissibility criteria in the original communication and therefore continue to do so now. What is new in the present communication is the clear evidence that, as a result of the State party's actions, the Committee was misled.

5.3 The failure of the State party to probe adequately the assurances presented by the United States Government resulted in its misleading the Committee on a crucial aspect. The Committee's Views in communication No. 1086/2002 would have been different had the Committee not relied upon those inaccurate assurances. Throughout his extradition proceedings and in his original communication the author challenged the veracity of the assurances.

5.4 The State party's observations raise the possibility of a domestic challenge. This argument was raised also in connection with communication No. 1086/2002 and the Committee found it unpersuasive. The author considers that there is no reason for the Committee to depart from its previous position as the putative remedy for official liability is not an effective one.

5.5 The author further alleges that he remains a victim under the Covenant of the State party's actions. The fact that he was extradited to the United States, where the alleged violations of the Covenant are actually occurring, cannot exonerate the State party from its responsibility and obligations not to expose him to violations of his rights in the first place. This principle, originally derived from non-refoulement, is an established and non-controversial feature of international human rights law. The assertions of the State party that the author's communication is against the United States fails to acknowledge the State party's direct complicity in exposing the author to violations of the Covenant.

5.6 The author remains convinced that the Committee's previous Views were adopted on the basis of the assurances received from Austria, which the Committee considered reliable. The author accepts that on occasion, the Committee will be required to rely upon assurances given to it by the State party. However, for the Committee to do so, it has to be certain as to their accuracy, particularly where these assurances engage a real and personal risk of a violation of the prohibition of inhuman and degrading treatment and the fundamental qualities of a fair trial. By failing to adequately probe the United States assurances, the State party continues to violate the author's rights under the Covenant. Therefore, the author will remain a victim until one or more of the proposed remedies outlined in the present communication are afforded to him. Simply transferring the author to another country does not absolve the sending country from its obligations. If it did, the effectiveness of the Covenant would be undermined and States parties could seek to avoid their obligations by creating what would be in effect "sham" removal proceedings.

5.7 On the merits, the author does not consider it necessary to address any of the issues relating to the Rule of Specialty with reference to Count 93 (“perjury while a defendant”). Where the Rule of Specialty is relevant is that according to this Rule, in these extradition proceedings, full appeal rights of the whole criminal proceedings against the author should have been considered a binding condition, including re-sentencing, for the author’s extradition to the United States. According to the assurances received, the United States authorities would provide a re-sentencing on all counts of the author’s sentence and not simply a reduction of his sentence by vacating Count 93. In reality, the author was later informed of existing United States jurisprudence according to which an extradition treaty did not establish jurisdiction of the court to amend existing judgments, but the executive branch would be bound by the principle of specialty and the sentence could thus be reduced in order to comply with such principle. In support of the conclusion that the author has no possibility to appeal in the United States, the author provides a copy of an affidavit presented by Professor Daniel J. Capra⁹ in which he states that although the United States Government, on 22 June 2001, asked the Court of Appeals to reinstate the author’s appeal, the jurisdictional time limit for an appeal had long passed and the Court of Appeals denied the Government’s request. Professor Capra continued by stating that at this point, the author cannot appeal his conviction and sentence, and the United States has no mechanism to obtain an appeal for the author. Although the author knew about the lack of effective appeal process available in the United States, he went through the process confirming his inability to appeal and continues to carry out this exercise.

5.8 As for the habeas corpus proceedings before the federal courts in the United States, the author contends that they did not form part of the assurances provided by the United States authorities, nor were they part of the author’s original communication before the Committee and as such they do not form part of the present communication. In any event, the habeas corpus, even if successful, would lead to the release of the author after the legal portion of his sentence has been served. Considering that the author’s sentence is of 845 years, this would mean that he could petition the court for relief after 835 years (minus time off for good behaviour). The author adds that these proceedings will take time to be exhausted, which reveals a general problem of length of judicial proceedings in the United States which the State party should also have considered before accepting assurances.

5.9 The author provides a copy of a letter dated 22 October 2008, sent by the Austrian Chancellor to the President of the United States, in which the Chancellor notes that the author’s extradition was granted in 2002 trusting in assurances that he would receive both a re-sentencing and a full appeal of his conviction and sentence; that after six years, he had received neither a re-sentencing nor a full appeal; that one possibility to resolve the issue rapidly would be a Presidential commutation of the sentence handed down to the author to 10 years, which would correspond to the maximum sentence had he been tried in Austria for the same crimes; and that an additional consideration for the commutation was that the author had undergone surgery for colon cancer and was in poor health. The author is grateful for the State party’s intervention but considers it insufficient to protect his rights under the Covenant. The author points out that the State party has not referred to this letter in its observations.

Additional observations from the State party

6.1 In its note dated 22 July 2009, the State party provided additional observations. It reiterates that in its notes of 8 February and 14 May 2002, the U.S. Department of Justice stated that the author was entitled, in its opinion, to make use of all remedies available

⁹ Professor of Law at Fordham University School of Law.

under the American legal system¹⁰ to challenge the decision for a reduction and re-fixing of the sentence, which would subsequently enable him to appeal the entire judgment. The author seems to be unaware of these possibilities when he does not refer in his response to the fact that the extradition by Austria had not been granted in respect of all counts of the judgement. On the other hand, the author does not deny that as a result of the habeas corpus proceedings, there will be a reduction of the penalty in the United States because his extradition for executing the sentence was denied on Count 93. In the State party's view, the Rule of Specialty will be complied with by the reduction of the penalty on Count 93. In addition to this reduction, it will be possible for the author to challenge the entire decision within the framework of the habeas corpus proceedings, if this is actually intended by him. According to the information available to the State party, the author did not previously request a reduction of the sentence, but a declaration that his extradition is invalid because it was fraudulently obtained and, accordingly, he should be immediately released. This request is however neither covered by the specialty principle nor does it follow from the above-mentioned explanations of the United States Department of Justice.

6.2 The State party contends that the duration of the proceedings so far referred to by the author is also due to the fact that he primarily requests his immediate release from detention.

6.3 Furthermore, the author presents an affidavit by Professor Capra of 24 August 2007. This affidavit is outdated following the memorandum opinion of the competent United States District Court,¹¹ which grants the author habeas corpus proceedings as an admissible means to invoke the specialty principle. In its memorandum opinion, the District Court opened up the possibility for the author to obtain re-entry of the judgement of February 2000 in identical form in every respect except that any reference to Count 93 of the Indictment, and any reference to or accumulation of any criminal sanction relating to Count 93, should be omitted. The Court added that such a result would comply with the rule of specialty created by the refusal of Austria to extradite the author as to Count 93, and it would afford the author his former right of appeal against the conviction and sentence as a whole, thereby rectifying the breach of the Treaty alleged in his petition of habeas corpus. The State party adds that even though the specialty principle is an obligation between sovereign States, it cannot remain unnoticed that the extradited person has taken procedural steps to which he was entitled, and which could reasonably be expected of him, to implement the specialty principle.

6.4 If the State party repeatedly requested the American authorities to conclude the still pending proceedings in the United States, this can by no means be regarded as an admission that the State party has violated its obligations under the Covenant. On the contrary, the State party thereby complies with paragraph 11.1 of the Committee's Views in relation to communication No. 1086/2002 by continuing to procure information on the proceedings pending in the United States. The suggestion made by the former Austrian Chancellor on 22 October 2008 to the President of the United States, quite obviously based on humanitarian considerations,¹² can do nothing to change this situation. The State party therefore requests the Committee to declare the communication inadmissible under article 5 of the Optional Protocol.

¹⁰ As mentioned previously, the State party does not indicate the legal remedies he is referring to.

¹¹ See above, para. 4.4.

¹² In his letter, the Chancellor mentions that an additional consideration for the commutation is that the author had had surgery for colon cancer and is in poor health and is willing to accept a commutation of 10 years.

Additional observations from the author

7.1 On 9 January 2012, the author informed the Committee about the judgements passed on first instance and on appeal regarding the habeas corpus proceedings. The Court of Appeals for the Eleventh Circuit, in particular in its judgement of 20 April 2010, confirmed that the rule of specialty required vacating Count 93 and that the resulting re-entry of judgement would permit the author to appeal his new sentence and original conviction. Having come to this conclusion, the Court determined that the proceedings for re-sentencing on a full appeal of his conviction and sentence could proceed. In the author's view, such proceedings do not solve the issue as the assurances received by the State party were that the author would receive a full re-sentencing on all counts of his conviction and not just relating to Count 93.

7.2 On 12 January 2012, the author added that his appeal to the Supreme Court against the Court of Appeals' judgement was denied on 18 April 2011. In accordance with the judgement of the Court of Appeals, the author's case for a re-sentencing without Count 93 is to be heard on 30 November 2012. The author is currently incarcerated at United States Penitentiary-Canaan, a high security prison.

Issues and proceedings before the Committee*Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The State party argues that domestic remedies were not exhausted as the author has not filed actions for official liability in connection with his extradition, which was allegedly made possible by the Austrian Administrative Court. The Committee notes the author's reply that the putative remedy for official liability is not an effective one. Recalling its Views regarding communication No. 1086/2002, the Committee considers that the State party has not demonstrated that the suggested remedies are effective, in view of the fact that the author was extradited and is now detained in the United States of America. The Committee therefore finds that it is not prevented from examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 With regard to the State party's argument that the author is not a victim under article 1 of the Optional Protocol, the Committee notes that the claim was brought against Austria as State party to the Optional Protocol and refers to the State party's failure to ensure that the author does not suffer any consequential breaches of his rights under the Covenant following his extradition from Austria to the United States of America. The present communication concerns the author's claims under article 14, paragraph 5, and article 7 of the Covenant, which the Committee considered it premature to address at the time of adoption of its Views on communication No. 1086/2002. The author holds the State party responsible for breaches of his rights under the Covenant as a result of his extradition to the United States of America. Accordingly, the Committee considers that the author has victim status, under article 1 of the Optional Protocol and that the matter of this communication differs from the matter examined in communication No. 1086/2002.

8.5 With regard to the author's allegations under article 14, paragraph 5, which the State party considers inadmissible, the Committee notes that in the framework of the habeas corpus proceedings that the author initiated, the United States Court of Appeals passed a

judgement on 20 April 2010 confirming the memorandum opinion of the United States district court dated 15 December 2008, according to which re-entry of the judgement passed in February 2000 was indeed possible and would call for the elimination of Count 93, the recalculation of the sentence without that count, and the resulting opportunity for a full appeal of his conviction and sentence. The Court concluded that having resolved the district court's authority to provide re-sentencing and a full appeal of his conviction and sentence without Count 93, the case as initially presented before the District Court following the author's extradition could now proceed. The Committee notes that in accordance with the judgement of the Court of Appeals, the author's case for a re-sentencing without Count 93 is to be heard on 30 November 2012.

8.6 In the light of the above, the Committee concludes that the author's claim under article 14, paragraph 5, has not been sufficiently substantiated for the purpose of admissibility under article 2 of the Optional Protocol.

8.7 As for the author's claim under article 7, the Committee considers it sufficiently substantiated for the purpose of admissibility and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee has to determine whether, at the time of extradition, the State party had ascertained, in the light of the information available to it at that time, that the author would face a real risk of a violation of article 7 of the Covenant.

9.3 The Committee notes the author's argument that his extradition to the United States of America where he faced a real risk of life imprisonment without the prospect of parole, for a property crime, constituted inhuman and degrading treatment and punishment under article 7 of the Covenant. The Committee notes that the Austrian Regional Upper Court considered in its judgement of 8 May 2002 that while the jurisprudence of the European Court of Human Rights¹³ admitted that extradition to a country where a person faces a life sentence could raise issues under article 3 of the European Convention on Human Rights, it had never come to the conclusion that a life sentence without parole was in itself a violation of article 3 of the Convention; article 3 of the Convention is similar to article 7 of the Covenant. The Committee further notes that in the author's case, the Austrian Court based its ruling, that his extradition to the United States of America would not constitute cruel, inhuman or degrading treatment or punishment, on the interpretation of the assurances received from the United States Department of Justice that the author had various possibilities to appeal his sentence.

9.4 While acknowledging that deporting a person to a country where the person will serve what is, for all practical purposes, a life sentence without parole such as that imposed on the author may raise issues under article 7 of the Covenant, in the light of the objectives of punishment as enshrined in article 10, paragraph 3, of the Covenant, the Committee considers that the decision of the State party to extradite the author to the United States of America must be assessed in the light of the legal developments at the time when the alleged violation took place. In this regard, the information provided to the Committee by both parties during the procedure appears to indicate that the State party based its decision

¹³ See more recently, European Court of Human Rights Judgement in *Babar Ahmad and others v. The United Kingdom*; 24 September 2012, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.

to extradite the author to the United States of America on the careful examination of the claim of the author by the Austrian Upper Regional Court in the light of the facts of the case and the applicable law at the time. Accordingly, the Committee considers that by extraditing the author, the State party did not violate his rights under article 7 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 7 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**U. Communication No. 1830/2008, *Pivonos v. Belarus*
(Views adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	Antonina Pivonos (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	25 August 2008 (initial submission)
<i>Subject matter:</i>	Imposition of a fine for non-compliance with the legal requirements on the organization of a picket
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Freedom of expression
<i>Articles of the Covenant:</i>	19, paragraph 2, and 21
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2012,

Having concluded its consideration of communication No. 1830/2008, submitted to the Human Rights Committee by Mrs. Antonina Pivonos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mrs. Antonina Pivonos, a Belarusian national born in 1946. She claims to be a victim of violations by Belarus of her rights under articles 19, paragraph 2, and 21, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

The facts as presented by the author

2.1 On 25 March 2008, at around 10.00 a.m., the author, together with Mrs. E. Zalesskaya and Mr. B. Khamaida, was standing next to a building located on Lenin Street in the city of Vitebsk. The author was holding a tapestry in her hands, while the other two were wearing white-and-red flags on top of their clothes. She explains that she wanted to

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

present a prayer from the Bible that she had embroidered on the tapestry to Mr. B. Khamaida, on the occasion of the 90th anniversary of the establishment of the Belarus People's Republic.

2.2 When the author unrolled the tapestry with the embroidered prayer, at around 10.40 a.m., she was apprehended by police officers of the Zheleznodorozhny District Department of Internal Affairs of Vitebsk, and accused of having violated the procedure on organizing or conducting pickets.

2.3 The same day, 25 March 2008, the Zheleznodorozhny District Court of Vitebsk established that the author had violated the provisions of the Law on Mass Events concerning the organization of pickets, thereby committing an administrative offence under article 23.34, paragraph 1, of the Belarus Code on Administrative Offences,¹ and sentenced her to pay a fine of 70,000 roubles.²

2.4 The author submits that, in court, she explained that her meeting with her two acquaintances, Mrs. Zalesskaya and Mr. B. Khamaida, was of a peaceful nature. She also pointed out that by discussing the 90th anniversary of the establishment of the Belarus People's Republic, they did not obstruct the movement of pedestrians or automobiles, did not interfere with the activities of any institutions or organizations, and did not chant any slogans or appeals. She also affirmed that her activities in no way disturbed public order and no complaints were made whatsoever.

2.5 The author maintains that her actions were wrongly defined as a picket; in the absence of any well-founded explanations justifying the court's conclusion, the penalty imposed on her cannot be justified by the need to protect national security or public order, public health or morals, or for respect of the rights and reputations of others.

2.6 The author submits that she has exhausted all domestic remedies: on 30 March 2008, she appealed the decision of the Zheleznodorozhny District Court of Vitebsk to the Vitebsk Regional Court, which rejected her appeal on 16 April 2008. On 22 April 2008, she filed an appeal to the Supreme Court, which was rejected on 11 June 2008.

The complaint

3. The author claims that the above-mentioned facts demonstrate that she is a victim of violations of her right to freedom of expression, guaranteed under article 19, paragraph 2, of the Covenant and her right to peaceful assembly, guaranteed under article 21 of the Covenant.

State party's observations on admissibility

4.1 On 19 February 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust domestic remedies, since her case had not been examined by the Chairman of the Supreme Court of Belarus or by the Prosecutor's Office under the supervisory review procedure. Under article 12.11, paragraphs 3 and 4, of the Belarus Code of Administrative Offences (B.C.A.O.), final judicial decisions can be reviewed within six months under the supervisory review proceedings upon the referral of a case in question to the court by the officials listed in article 12.11, paragraphs 3 and 4, of the said Code.

¹ Article 23.34, paragraph 1, of the Belarus Code on Administrative Offences: Violation of the procedure on organization or conduct of street processions or pickets.

² Approx. 21 euros. The Court also ordered the confiscation of the tapestry displaying a prayer from the Bible.

4.2 The State party submits that according to article 12.11, paragraphs 3 and 4, of the B.C.A.O., upon the author's request, the Chairman of the Supreme Court or the Prosecutor General can initiate supervisory review of the case and notes that the author did not avail herself of these avenues for appeal.

Author's comments on the State party's observations

5. On 12 April 2009, the author notes *inter alia* that the administrative proceedings initiated against her were of a political nature and that she has exhausted all available and effective remedies by appealing the decision of the Zheleznodorozhny District Court of Vitebsk to the Vitebsk Regional Court on 30 March 2008 and by submitting a further appeal to the Supreme Court of Belarus on 22 April 2008. An appeal submitted by an individual under the supervisory proceedings, according to her, would not have resulted in the review of the court decisions in question.

Additional observations by the State party

6.1 On 26 May 2009, the State party noted that article 35 of the Constitution guarantees the freedom to hold assemblies, gatherings, street processions, demonstrations and pickets which do not disrupt public order and do not violate the rights of other citizens. The procedure for holding such events is provided by law. In this respect, the provisions of the Law on Mass Events are aimed at creating the conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets and squares and in other public locations. The State party further recalls that the author was lawfully found guilty of having committed an administrative offence under article 23.34, paragraph 1, of the B.C.A.O. and a fine of 70,000 roubles was imposed on her by the Zheleznodorozhny District Court of Vitebsk on 25 March 2008. The said decision was later upheld by the Vitebsk Regional Court and by the Supreme Court.

6.2 The State party adds that, according to article 19, paragraph 2, of the Covenant, every individual has the right to freedom of expression; this right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his own choice. However, article 19, paragraph 3, of the Covenant, imposes special duties and responsibilities on the rights holder and thus the right to freedom of expression may be subjected to certain restrictions that shall be provided by law and are necessary: (a) for the respect of the rights or reputation of others; and (b) for the protection of national security or public order, or of public health or morals. Article 21 of the Covenant recognizes the right to peaceful assembly. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

6.3 The State party explains that as a party to the Covenant, it has incorporated the provisions of articles 19 and 21 into the domestic legal system. In conformity with article 23 of the Constitution, restrictions upon the rights and freedoms of individuals are only permitted in the instances specified by law, in the interest of national security, public order, protection of public health and morals, and of the rights and freedoms of other persons. The analysis of article 35 of the Constitution, which guarantees the right to "freedom of public events", clearly demonstrates that the Constitution establishes the legislative framework for the procedure for holding such events. Organization and holding of assemblies, gatherings, street marches, demonstrations and pickets is regulated by the Law on Mass Events of 7 August 2003. Freedom of expression, as guaranteed under the Constitution, may be subject to restrictions only in instances provided by law, in the interest of national security, public

order, protection of public health and morals, and of the rights and freedoms of other persons. Therefore, the restrictions provided for under Belarusian law are in conformity with the State party's international obligations, and are aimed at protecting national security and public order – in particular, this concerns the provisions of article 23.34 of the B.C.A.O. and article 8 of the Law on Mass Events.

Author's further submission

7.1 By letter of 23 July 2009, the author rejected the State party's arguments that the administrative sanction imposed on her for violation of the procedure for organizing and holding a picket was lawful and was in conformity with the permissible restrictions set out in article 19 and article 21 of the Covenant, as: the encounter on 25 March 2008 was of a peaceful nature; the attire (white-and-red flag worn over clothes and the embroidered tapestry) was not prohibited by national law; during the encounter, there were no slogans expressing a stance favourable to the overthrow of the regime in power, incitement to mass riots or to other unlawful actions; the police officers breached the author's rights of peaceful assembly and freedom of expression; the State party did not indicate that the encounter caused disturbances to public health or morals or impeded the protection of the rights and freedoms of others; nor did the State party indicate that the encounter endangered national security, public order, or the health and wellbeing of the population.

7.2 The author further submitted that the participants during the encounter merely discussed the anniversary and in no way disturbed the movement of means of transport or pedestrians, did not interfere with the activities of any institutions or organizations, did not chant any slogans or appeals and did not impart any information to the population.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author failed to file an application for supervisory review to the Chairman of the Supreme Court of Belarus and to the Prosecutor's Office, with a supervisory review complaint, and that, therefore, she had not exhausted the available domestic remedies. The Committee notes, however, that the State party has not shown whether or in how many cases supervisory review procedures were applied successfully in cases concerning freedom of expression. The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force do not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.³ In light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

³ See, for example, communication No. 1814/2008 *P.L. v. Belarus*, decision of inadmissibility of 26 July 2011, para. 6.2.; communication No. 1784/2008 *Schumilin v. Belarus*, Views of 23 July 2012, para. 8.3.

8.4 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her claims under article 19, paragraph 2, and article 21, of the Covenant. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claims that the fine imposed on her when trying to present a gift to an acquaintance, on the street, and the confiscation of the gift in question (an embroidered tapestry) constitutes an unjustified restriction on her freedom to impart information, as protected by article 19, paragraph 2, of the Covenant. It further notes the State party's contention that the author was administratively sanctioned in accordance with the requirements of national legislation for having breached the procedure for the organization and holding of a picket. The Committee considers that, irrespective of the definition of the author's encounter on 25 March 2008 by the national courts, the above actions by the authorities amount to de facto limitations of the author's rights, in particular of her right to impart information and ideas of all kind, as protected by article 19, paragraph 2, of the Covenant. The Committee has thus to consider whether the restrictions imposed on the author's right to freedom of expression are justified under any of the criteria set out in article 19, paragraph 3. The Committee observes that article 19, paragraph 3, of the Covenant provides for certain restrictions only as provided by law and necessary: (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. It recalls that according to its general comment No. 34, freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.⁴ Any restrictions on the exercise of such freedoms must conform to strict tests of necessity and proportionality and "be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."⁵

9.3 The Committee recalls that it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party may introduce a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant. The Committee notes the State party's explanation that the Law on Mass Events is aimed at creating the conditions for the enjoyment of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of public events on streets, squares and other public locations. The Committee notes, however, that regardless of the kind of event at issue, the State party has not supplied any specific indication as to how the restrictions imposed on the author's rights under article 19 of the Covenant, in light of her concrete acts (as described in paragraphs 2.1 and 2.2 above), and the confiscation of her tapestry, were justified under article 19, paragraph 3, of the Covenant. The Committee therefore considers that, in the circumstances of the case, the State party has not shown how the fine imposed on the author was justified under any of the criteria set out in article 19,

⁴ See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

⁵ *Ibid.*, para. 22.

paragraph 3. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant have been violated.

9.4 In view of this conclusion, the Committee decides not to examine separately the author's claim under article 21 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the return of the confiscated property or its value, reimbursement of the present value of the fine and any legal costs incurred by the author, together with compensation. The State party is also under obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**V. Communication No. 1835/2008, *Yasinovich v. Belarus*
Communication No. 1837/2008, *Shevchenko v. Belarus*
(Views adopted on 20 March 2013, 107th session)***

<i>Submitted by:</i>	Anton Yasinovich (1835/2008) and Valery Shevchenko (1837/2008) (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belarus
<i>Date of communication:</i>	7 May 2008 (Yasinovich) and 1 June 2008 (Shevchenko) (initial submissions)
<i>Subject matter:</i>	Imposition of a fine for the alleged violation of the procedure for recall of a deputy of the House of Representatives
<i>Procedural issues:</i>	Level of substantiation of a claim; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to freedom of expression, including freedom to seek, receive and impart information and ideas; permissible restrictions; discrimination on the ground of political opinion
<i>Article of the Covenant:</i>	19
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2013,

Having concluded its consideration of communications Nos. 1835/2008 and 1837/2008, submitted to the Human Rights Committee by Anton Yasinovich and Valery Shevchenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communications are Anton Yasinovich, born in 1964, and Valery Shevchenko, born in 1943. Both are the nationals of Belarus and currently reside in Novopolotsk, Belarus. They claim to be victims of a violation by Belarus of their rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The authors are not represented.

1.2 On 19 February 2009, the State party requested the Committee to examine the admissibility of the two communications separately from their merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 16 November 2009, the Special Rapporteur for new communications and interim measures decided, on behalf of the Committee, to examine the admissibility of the communications together with their merits.

1.3 On 20 March 2013, pursuant to rule 94, paragraph 2, of the Committee's rules of procedure, the Committee decided to join consideration of the two communications as they are based on the same facts and the authors advance similar claims.

The facts as presented by the authors

2.1 From 27 June to 27 July 2007, the authors, together with a group of residents of Novopolotsk city, were carrying out street actions (pickets) in protest of the abolition of social benefits to persons in need. They had been given prior approval for the pickets by the Novopolotsk City Executive Committee. In the course of the pickets, they were collecting signatures to an appeal, which, inter alia, contained the following text: "We are protesting against the abolition of the benefits and we are supporting the recall of those deputies elected to represent Novopolotsk, who had voted for this anti-popular law". The authors state that the collection of signatures under this text was done on the understanding that deputies are public political figures, whose actions and omissions to act could and should be freely subjected to reprimand or criticism by their voters. All collected signatures were transmitted to the Presidential Administration for follow-up action, and the results of the signature collection were shared with the journalists.

Case of Anton Yasinovich

2.2 At around 8 p.m. on 21 September 2007, Mr. Yasinovich was detained by police officers at the entrance to his workplace and taken to the Novopolotsk City Executive Committee. A staff member of the Novopolotsk City Executive Committee drew up an incident report, stating that Mr. Yasinovich had committed an administrative offence under article 9.10 of the Administrative Offences Code (violation of the legislation on elections, referendum, recall of a deputy and exercise of the citizens' right of legislative leadership). He was accused, in particular, of having violated articles 130–137 of the Electoral Code, establishing the procedure for recall of a deputy of the House of Representatives and a deputy of a local Council of Deputies.

2.3 Mr. Yasinovich notes that, despite his numerous motions, he was denied the right to have a lawyer from the very beginning of administrative proceedings, contrary to the requirements of article 4.1, paragraph 5, of the Procedural Executive Code on Administrative Offences. Furthermore, he states that there were no legal grounds for taking him to the Novopolotsk City Executive Committee, because as a rule that measure is applied only after one is summoned to appear in court or to come to the police and fails to do so. On the contrary, he was not served any summons.

2.4 On 25 September 2007, the Novopolotsk City Court found Mr. Yasinovich guilty of having committed an administrative offence under article 9.10 of the Administrative

Offences Code and a fine of 775,000 Belarusian roubles was imposed.¹ The court based its decision on the following grounds:

(a) As transpired from the application of 12 June 2007 for permission to organize pickets in order to draw public attention to the social problems, Mr. Yasinovich was one of the organizers of the pickets in question;

(b) On 21 June 2007, the Novopolotsk City Executive Committee approved the conduct of daily pickets from 27 June to 27 July 2007 between 5 p.m. and 6 p.m. only. However, in the course of pickets, Mr. Yasinovich was also engaged in collecting signatures urging the recall of those deputies who had voted for abolition of social benefits, which were subsequently transmitted to the Presidential Administration;

(c) By his actions, Mr. Yasinovich violated articles 130–137 of the Electoral Code, according to which the procedure for recall of a deputy of the House of Representatives may be initiated at the meeting of voters of the electoral constituency from which this deputy was elected and has to comply with a number of requirements established by law. In particular, the deputy in question has the right to be present at the meeting of voters and to take the floor; an initiative group established in order to collect signatures should be properly registered; subscription lists should include information about the deputy's name, date of birth, position, place of work, place of residence and year of election; as well as voters' personal data and passport details. These requirements had not been complied with by the organizers of pickets, including Mr. Yasinovich.

2.5 On 1 October 2007, Mr. Yasinovich filed a cassation appeal against the decision of the Novopolotsk City Court to the Vitebsk Regional Court, which was rejected on 10 October 2007. In the appeal Mr. Yasinovich argued, *inter alia*, that:

(a) The incident report was drawn up outside of the working hours on the premises of the Novopolotsk City Executive Committee, where he was escorted by police officers after being detained at the entrance to his workplace. Mr. Yasinovich was denied the right to be represented by a lawyer at the time when the said incident report was drawn up (see paras. 2.2 and 2.3 above);

(b) Article 135 of the Electoral Code allows an unregistered initiative group to collect signatures with the reservation that they do not bring about any legal consequences;

(c) He exercised the right of a collective appeal provided for in article 40 of the Belarus Constitution,² by sending the collective appeal of citizens to a State body. His actions, however, were wrongly interpreted by the Novopolotsk City Court as an essential element of a violation of articles 130–137 of the Electoral Code;

(d) Under article 7.6, part 1, paragraph 1, of the Administrative Offences Code, the statute of limitations for holding Mr. Yasinovich liable for allegedly unlawful collection of signatures, supporting the recall of those deputies who had voted for the abolition of social benefits, took effect on 27 September 2007. Therefore, the administrative proceedings in relation to the actions in question should be terminated since, on that date,

¹ According to online exchange converters, on 25 September 2007 (date of the fine), this amount was equivalent to US\$ 360.60 or €255.50. On 20 March 2013, due to an unprecedented devaluation of the Belarusian rouble, the amount is worth US\$ 90.10 or €69.60.

² Article 40 of the Belarus Constitution reads as follows (unofficial translation): "Everyone shall have the right to address personal or collective appeals to State bodies. State bodies as well as the officials thereof shall consider any appeal and furnish a reply thereto within the period determined by law. Any refusal to consider an appeal that has been submitted shall be justified in writing."

the decision of the Novopolotsk City Court of 25 September 2007 had not yet come into force.

2.6 On 11 February 2008, the Deputy Chairperson of the Supreme Court dismissed the appeal submitted by Mr. Yasinovich to the Chairperson of the Supreme Court on 12 December 2007 under the supervisory review procedure against the decision of the Novopolotsk City Court of 25 September 2007 and the ruling of the Vitebsk Regional Court of 10 October 2007. The Deputy Chairperson of the Supreme Court rejected the argument of Mr. Yasinovich that his actions did not constitute an administrative offence, and concluded that the lower courts had correctly qualified his actions under article 9.10 of the Administrative Offences Code.

Case of Valery Shevchenko

2.7 On 24 September 2007, a staff member of the Novopolotsk City Executive Committee drew up an incident report in Mr. Shevchenko's presence, stating that the latter had committed an administrative offence under article 9.10 of the Administrative Offences Code (violation of the legislation on elections, referendum, recall of a deputy and exercise of the citizens' right of legislative leadership). He was accused, in particular, of having violated articles 130–137 of the Electoral Code, establishing the procedure for recall of a deputy of the House of Representatives and a deputy of a local Council of Deputies.

2.8 On 25 September 2007, the Novopolotsk City Court found Shevchenko guilty of having committed an administrative offence under article 9.10 of the Administrative Offences Code and a fine of 1,085,000 Belarusian roubles was imposed.³ In addition to the grounds summarized in paragraph 2.4 above, the court based its decision on the following:

(a) Mr. Shevchenko acknowledged in court that he had transmitted to the Presidential Administration the subscription lists entitled, "We are against the abolition of social benefits" with a cover letter containing the following text: "We are supporting the recall of those deputies elected to represent Novopolotsk, who had voted for this anti-popular law";

(b) The court rejected the argument of Mr. Shevchenko that the pickets and collection of signatures were carried out with the aim of protesting against the abolition of the social benefits and to study public opinion on the recall of those deputies of the House of Representatives who had voted for this law, rather than to recall the said deputies. It established that Mr. Shevchenko "took concrete actions [aimed at recall of a deputy]", by having collected signatures under the text "we support the recall of deputies". Furthermore, his letter addressed to the Presidential Administration also contained the text "we support the recall of deputies".

2.9 On 4 October 2007 and 17 October 2007 (supplementary submission), Mr. Shevchenko filed a cassation appeal against the decision of the Novopolotsk City Court to the Vitebsk Regional Court, which was rejected on 17 October 2007. In the appeal, Mr. Shevchenko has argued, inter alia, that:

(a) The Novopolotsk City Court had wrongly interpreted the appeal containing the following text: "We are protesting against the abolition of the benefits and we are supporting the recall of those deputies elected to represent Novopolotsk, who had voted for this anti-popular law", as a subscription list aimed at the recall of a deputy. With reference to article 1 of the Law on Appeals from Citizens in the Republic of Belarus, he argues that

³ According to online exchange converters, on 25 September 2007 (date of the fine), this amount was equivalent to US\$ 504.90 or €357.70. On 20 March 2013, due to an unprecedented devaluation of the Belarusian rouble, the amount is worth US\$ 126.20 or €97.50.

the said text together with the citizens' signatures is to be understood as the collective appeal of citizens to a State body. The Presidential Administration, as the State body to which the collective appeal was addressed, was supposed to furnish a detailed reply to all of the demands put forward in the appeal, including an explanation that the recall of a deputy did not fall within the competence of the Presidential Administration. Even if the same collective appeal had been subsequently submitted to the Central Electoral Commission with the request to initiate the recall of a deputy, it would have been rejected for failure to comply with the procedure for recall of a deputy. Mr. Shevchenko has not violated the said procedure, since the organizers who initiated the collection of signatures have acted in strict compliance with the Law on Appeals from Citizens in the Republic of Belarus. Furthermore, only the Central Electoral Commission could be guided by the Electoral Code and could have explained the rights and obligations of citizens in relation to the procedure for recall of a deputy;

(b) Articles 191 and 192 of the Criminal Code establish criminal responsibility for a serious violation of the legislation on elections, whereas article 9.10 of the Administrative Offences Code establishes administrative liability for actions, which interfere with the normal functioning of electoral commissions and normal development of the election process. Therefore, erroneous actions of citizens in relation to the initiation of the election process (for example, incorrect execution of documents, filing of appeals to wrong state bodies, etc.) should only result in the refusal to consider their incorrectly formulated appeals and/or demands;

(c) Article 33 of the Belarus Constitution guarantees freedom of thought and beliefs and their free expression and article 19 of the Covenant, to which Belarus is a State party, also provides for the right to freedom of expression, including freedom to seek, receive and impart information;

(d) What he transmitted to the Presidential Administration was not the subscription lists aimed at the recall of a deputy but the collective appeal in which citizens expressed their opinion in relation to the abolition of social benefits by the parliament and the need to question the attitude towards deputies who had voted for this anti-popular law.

2.10 On 11 January 2008, the Deputy Chairperson of the Supreme Court dismissed the appeal submitted by Mr. Shevchenko to the Chairperson of the Supreme Court on 19 November 2007 under the supervisory review procedure against the decision of the Novopolotsk City Court of 25 September 2007 and the ruling of the Vitebsk Regional Court of 17 October 2007. The Deputy Chairperson of the Supreme Court rejected the argument of Shevchenko that his actions did not constitute an administrative offence and concluded that the lower courts had correctly qualified his actions under article 9.10 of the Administrative Offences Code.

The complaint

3.1 The authors contend that they have exhausted all available and effective domestic remedies.

3.2 The authors claim a violation of their rights under article 19, paragraph 2, of the Covenant, because by imposing an administrative fine, the State party's authorities have effectively deprived them of the right to freedom of expression, including freedom to seek, receive and impart information. They argue that the pickets and collection of signatures were carried out with the aim of protesting against the abolition of the social benefits and studying public opinion on the recall of those deputies of the House of Representatives who had voted for that law, rather than to recall the said deputies. The lists of signatures did not contain any information that would limit or infringe the rights of these deputies and/or assess their professionalism. Moreover, none of the deputies had initiated a civil action

against any of the picket's organizers, including Messrs. Yasinovich and Shevchenko, to restore their good name, honour and reputation.

3.3 The authors add that their and the other co-organizers' actions did not threaten the interests of national security or of public order, or of public health or morals. Collected information did not belong to the category of classified information and did not involve State secrets.

3.4 Mr. Yasinovich additionally submits that the State party's courts have examined his case only within the framework of the Administrative Offences Code, without taking into account his right to freedom of expression, including freedom to seek, receive and impart information provided for in article 19 of the Covenant. He challenges the allegation of a violation of articles 130–137 of the Electoral Code, for the following reasons:

(a) The State party's authorities have failed to establish what was his *actus reus* and what were the negative consequences of his allegedly illegal actions. Mr. Yasinovich submits that the collection of signatures was carried out in the course of pickets for which prior formal approval had been obtained. Furthermore, the transmittal of information on the negative public opinion about the law that had abolished social benefits to the Presidential Administration did not cause any negative consequences for Belarus;

(b) He refers to article 34 of the Belarus Constitution, which guarantees the right to receive, store, and disseminate complete, reliable and timely information on the activities of State bodies and public associations, on political, economic and international life, and on the state of the environment. The fact that the State party's authorities authorized the pickets implies that the aims of the pickets also received the authorities' approval. Furthermore, at the time when the pickets took place, the law enforcement authorities did not proffer any reproof about the conduct of the pickets, as they were taking place in an authorized place, at an authorized time and without any disturbance of the public order.

State party's observations on admissibility

4.1 On 19 February 2009, the State party recalls the chronology of the communications submitted by Mr. Yasinovich (see paras. 2.4–2.6 above) and Mr. Shevchenko (see paras. 2.8–2.10 above) and challenges their admissibility, arguing that the authors have failed to exhaust domestic remedies. It submits that, under domestic administrative law, they had the possibility to appeal the decision of the Novopolotsk City Court to the Chairperson of the Supreme Court, as well as to file a motion to the Prosecutor General, requesting him to lodge an objection with the Chairperson of the Supreme Court. The decision of the Chairperson of the Supreme Court is final and not subject to further appeal.

4.2 The State party further submits that, pursuant to article 12.11, parts 3 and 4, of the Procedural Executive Code on Administrative Offences, an objection to a decision on an administrative offence that has entered into force may be lodged within six months from the date of its entry into force. An objection filed after the time limit cannot be considered. Since the authors did not submit any complaints to the Prosecutor's Office, they have not exhausted all available domestic remedies. Furthermore, there are no reasons to believe that the application of those remedies would have been unavailable or ineffective.

Authors' comments on the State party's observations

Case of Anton Yasinovich

5.1 In his comments of 18 September 2009, Mr. Yasinovich argues that the State party has effectively acknowledged in its observations that the events described in his communication took place and that he was fined for his participation in the pickets and collection of signatures. The latter leads him to infer that the State party has also conceded

that he was subjected to administrative liability for his endeavours to disseminate critical information about the activities of State authorities and for public expression of his opinion.

5.2 Mr. Yasinovich recalls that he had already availed himself of the right to file a cassation appeal before the Vitebsk Regional Court and an application for supervisory review to the Chairperson of the Supreme Court. Although he invested substantial time and financial resources into the litigation before the State party's courts, his efforts have not yielded any results and none of his arguments have been duly examined. He submits, therefore, that the supervisory review procedure that requires lodging of objection by the chairpersons of the courts and by the prosecutorial review bodies is ineffective, time-consuming and expensive due to the requirement to pay court fees.

5.3 Mr. Yasinovich adds that he is a member of a registered political party, the Belarusian Social Democratic Party (Hramada), which is currently in opposition and, consequently, has critical views on the political and social processes in the country. The criticism of these processes is not prohibited by law and constitutes one of the party activities. Mr. Yasinovich maintains that the pickets were authorized by the authorities, thus giving an opportunity to carry out legitimate political activities. He concludes that, by subjecting him to administrative liability for legitimate political and social activities, the State party's authorities have violated article 19, paragraph 2, of the Covenant.

Case of Valery Shevchenko

5.4 In his comments of 30 September 2009, Mr. Shevchenko recalls that he requested a supervisory review of the decision of the Novopolotsk City Court before the Chairperson of the Supreme Court and that his request was rejected by the Deputy Chairperson of the Supreme Court on 11 January 2008. Therefore, the State party's argument that he should have appealed the decision of the Novopolotsk City Court to the Chairperson of the Supreme Court is illogical. He further submits that the supervisory review procedure in Belarus is generally ineffective and accessory, but in cases involving a violation of civil and political rights of citizens it turns into an additional "punishment mechanism" when the person concerned has to spend his or her time and financial resources (to pay court fees), knowing perfectly well in advance that the appeal does not have any prospect of success. Moreover, the outcome of such cases is predetermined by the fact that judiciary in Belarus is dependent on the executive power.⁴

5.5 Mr. Shevchenko argues that the requirement to exhaust the supervisory review procedure should not be a mandatory prerequisite for making recourse to the international mechanisms of human rights protection, since the decision to put forward a request for supervisory review does not depend on the will of the person concerned but is purely within the discretion of a limited number of high-level judicial officers, such as the Chairperson of the Supreme Court. Even when such review is granted, it does not conform to the requirements of a fair and public hearing that upholds the principle of equality of arms.

5.6 Mr. Shevchenko further submits that it is very unlikely that the Chairperson of the Supreme Court would be able to take a decision in favor of a person, alleging a violation of the rights guaranteed under the Covenant, when the State party continuously refuses to implement the Committee's Views, claiming that its conclusions are not of a mandatory nature. He adds that, for the above-mentioned reasons, the supervisory review procedure involving the Prosecutor's Office is equally ineffective.

⁴ Reference is made to the Report on the mission to Belarus of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Kumaraswamy (E/CN.4/2001/65/Add.1), 8 February 2001.

State party's further observations on admissibility and merits

6. On 8 September 2010, the State party submits, with regard to both communications, that it reiterates its observations submitted on 19 February 2009.

Authors' comments on the State party's further observations

7.1 On 4 November 2010, Mr. Yasinovich submits his comments on the State party's further observations. He maintains that the State party has violated his right to freedom of expression, freedom to seek and impart information provided for in article 19, paragraph 2, of the Covenant. Furthermore, by subjecting him to administrative liability for his participation in the authorized pickets, the State party's authorities have discriminated against him on the ground of his membership in the opposition political movement, the Belarusian Social Democratic Party (Hramada). He claims, therefore, that his rights under article 2 of the Covenant have also been violated. With reference to article 34 of the Belarus Constitution, Mr. Yasinovich reiterates his initial arguments that the information collected was not of confidential or private character, it did not infringe upon the deputies' right to private life and did not endanger State security.

7.2 No further comments on the State party's further observations on admissibility and merits of 8 September 2010 were received from Mr. Shevchenko.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in the communications, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communications are admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the authors had the possibility to appeal the decision of the Novopolotsk City Court to the Chairperson of the Supreme Court, as well as to file a motion to the Prosecutor General, requesting him to lodge an objection with the Chairperson of the Supreme Court. The Committee further notes the authors' explanation that their respective appeals submitted under the supervisory review procedure were rejected by the Chairperson of the Supreme Court and that they did not file a motion to the Prosecutor's Office, since such a procedure does not constitute an effective domestic remedy.

8.4 In this regard, the Committee recalls its jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.⁵ In such circumstances and noting that the authors have appealed to the Chairperson of the Supreme Court with the request to initiate a supervisory review of the decisions of the Novopolotsk City Court and the rulings of the Vitebsk Regional Court, and that these appeals were rejected, the

⁵ See, for example, communication No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.3; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; communication No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011, para. 8.3.

Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communications.

8.5 In relation to the allegation that the State party's authorities have discriminated against Mr. Yasinovich on the ground of his membership in the opposition political movement (see, para. 7.1 above), the Committee considers that this claim has been insufficiently substantiated, for purposes of admissibility. It further remains unclear whether this allegation was raised at any time before the State party's authorities and courts. In these circumstances, the Committee considers that this part of the communication submitted by Mr. Yasinovich is inadmissible under article 2 of the Optional Protocol.

8.6 The Committee considers that the authors have sufficiently substantiated, for purposes of admissibility, their claims under article 19 of the Covenant. Accordingly, it declares these claims admissible and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communications in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the authors' claims that the administrative fines imposed on them in the course of the authorized pickets for having collected signatures to a collective appeal, containing the following text: "We are protesting against the abolition of the benefits and we are supporting the recall of those deputies elected to represent Novopolotsk, who had voted for this anti-popular law", and subsequent transmittal of this collective appeal to the Presidential Administration, constitute an unjustified restriction on their right to freedom of expression, including freedom to seek, receive and impart information, as protected by article 19, paragraph 2, of the Covenant. It further notes that, according to the decisions of the Novopolotsk City Court of 25 September 2007, the authors were found guilty of having committed an administrative offence under article 9.10 of the Administrative Offences Code for a violation of articles 130–137 of the Electoral Code, establishing, inter alia, the procedure for the recall of a deputy of the House of Representatives. The Committee considers that, irrespective of the qualification of the authors' actions by the State party's courts, an imposition of the administrative fines on them amounts to a de facto restriction on their right to freedom of expression guaranteed by article 19, paragraph 2, of the Covenant.

9.3 The Committee has to consider whether the restriction imposed on the authors' right to freedom of expression is justified under article 19, paragraph 3, of the Covenant, i.e. provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls in this respect its general comment No. 34 (2011) on freedoms of opinion and expression on article 19 of the Covenant,⁶ in which it stated, inter alia, that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society and that they constitute the foundation stone for every free and democratic society.⁷ Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and "must be

⁶ See general comment No. 34 (2011) on freedoms of opinion and expression, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

⁷ *Ibid.*, para. 2.

applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.⁸

9.4 The Committee notes that the authors have argued that neither article 9.10 of the Administrative Offences Code nor articles 130–137 of the Electoral Code apply to them, since the State party’s courts have interpreted the collective appeal, containing the following text: “We are protesting against the abolition of the benefits and we are supporting the recall of those deputies elected to represent Novopolotsk, who had voted for this anti-popular law” and subsequently transmitted to the Presidential Administration, as a subscription list aimed at the recall of a deputy rather than the collective appeal of citizens to a State body, within the meaning of article 40 of the Belarus Constitution and article 1 of the Law on Appeals from Citizens in the Republic of Belarus. The Committee further notes that, according to the decisions of the Novopolotsk City Court of 25 September 2007, the authors have not complied with the requirements of the procedure for the recall of a deputy of the House of Representatives, and have thus violated articles 130–137 of the Electoral Code. In this regard, the Committee notes that the authors and the State party disagree on whether the document transmitted to the Presidential Administration was the “collective appeal of citizens to a State body” or the “subscription list aimed at the recall of a deputy”, as well as on what legislation is applicable to the collection of signatures in the present context.

9.5 In this regard, the Committee recalls that article 19, paragraph 2, of the Covenant protects all forms of expression and the means of their dissemination,⁹ including political discourse and commentary on public affairs.¹⁰ Furthermore, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.¹¹ As to the requirement that restrictions on the exercise of the right to freedom of expression be “provided by law”, the Committee further recalls that laws restricting the rights enumerated in article 19, paragraph 2, must themselves be compatible with the provisions, aims and objectives of the Covenant¹² and that it is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression,¹³ as well as to provide details of the law and of actions that fall within the scope of the law.¹⁴ The Committee regrets the lack of detail in the response of the State party on the scope of the law. While the Committee recognizes the need for a pre-established procedure for the actual recall of a parliamentary deputy, there is no compelling reason to limit the public dialogue on removal from office, including the right of citizens to voice their support for such a procedure, before the actual initiation thereof. The Committee notes that, in the light of articles 130–137 of the Electoral Code, the collection of signatures by the authors to support the recall of deputies is so distinctly different from the procedure for recall of a deputy of the House of Representatives and a deputy of a local Council of Deputies that it can only be considered as an expression of the opinion that these deputies should be recalled, rather than initiating the recall procedure in an unlawful way.

⁸ Ibid., para. 22.

⁹ Ibid., para. 12.

¹⁰ Ibid., paras. 11 and 38. See also general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V, paras. 8 and 25.

¹¹ See general comment No. 34 (2011), para. 20.

¹² Ibid., para. 26. See also communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994.

¹³ See communication No. 1553/2007, *Korneenko and Milinkevich v. Belarus*, Views adopted on 20 March 2009.

¹⁴ See communication No. 132/1982, *Jaona v. Madagascar*, Views adopted on 1 April 1985.

9.6 Furthermore, the Committee considers that, even if the collection of signatures by the authors was subject to the procedure established by articles 130–137 of the Electoral Code, the State party has not advanced any argument as to why the administrative sanction imposed on them was necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant, and what dangers would have been created by the authors' gathering opinions of their fellow citizens and expressing their own opinions in relation to the abolition of social benefits by the parliament, as well as the deputies who had voted for the said changes in law. The Committee recalls in this connection that, under article 19, paragraph 3, of the Covenant, the burden of proof rests on the State.¹⁵ The Committee concludes that in the absence of any pertinent explanations from the State party, the restriction on the exercise of the authors' right to freedom of expression cannot be deemed as provided by law and necessary for the protection of national security or of public order (*ordre public*) or for respect for the rights or reputations of others. It therefore finds that the authors' rights under article 19, paragraph 2, of the Covenant have been violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under article 19, paragraph 2, of the Covenant.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including reimbursement of the present value of the fines and any legal costs incurred by them, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Administrative Offences Code, to ensure its conformity with the requirements of article 19, paragraph 3, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

¹⁵ See, for example, communication No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3

**W. Communication No. 1836/2008, *Katsora v. Belarus*
(Views adopted on 24 October 2012, 106th session)***

<i>Submitted by:</i>	Vladimir Katsora (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	20 May 2008 (initial submission)
<i>Subject matter:</i>	Imposition of an administrative arrest to an individual for having distributed leaflets in violation of the right to disseminate information without unreasonable restrictions
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to impart information; permissible restrictions
<i>Articles of the Covenant:</i>	2; 19; 21
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2012,

Having concluded its consideration of communication No. 1836/2008, submitted to the Human Rights Committee by Vladimir Katsora under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Vladimir Katsora, a Belarusian national born in 1983. He claims to be a victim of violations by the State party of his rights under articles 19, paragraph 2, and 21, read in conjunction with article 2 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as presented by the author

2.1 In April 2006, the author, then deputy chairperson of the Gomel regional branch of the United Civic Party organization, printed out and distributed leaflets, informing the Gomel population about a meeting intended to take place in this city, on 25 April 2006, without however indicating either exact place or time of the event. When the leaflets were distributed, the author, as an organizer, had yet not received the authorization of the Gomel Regional Executive Committee to conduct the event in question. Under article 8 of the Law on Mass Events of 30 December 1997, before receiving authorization to hold a mass event, the organizer(s) or other persons have no right to announce in mass media information concerning the date, place and the time of its holding, or to prepare and distribute leaflets, posters and other materials in this regard.

2.2 On 14 April 2006, the police seized a number of the leaflets in question, which were distributed by other individuals in Gomel. On 18 April 2006, the Zheleznodorozhny District Court of Gomel found the author guilty of having committed an administrative offence under article 167-1, part 1, of the Code on Administrative Offences (breach of the procedure for organizing and conduct of events, assemblies, etc.) and sentenced him to 10 days of administrative arrest. On an unspecified date, the author complained to the Gomel Regional Court. On 23 May 2006, the Chairperson of the Gomel Regional Court upheld the ruling of the Zheleznodorozhny District Court of Gomel. The author explains that he did not appeal the ruling of the Gomel Regional Court to the Supreme Court, as according to him, supervisory review proceedings in Belarus are ineffective, as they do not automatically result in the review of the case. He refers to the Committee's case law, according to which only available and effective remedies are to be exhausted.

2.3 Subsequently, on 12 February 2008, the author printed out and distributed leaflets, informing the population about a forthcoming debate between Aleksander Milinkevich, former presidential candidate, and citizens of Gomel, to take place on 15 February 2008. On 13 February 2008, the author was summoned to the Department of Internal Affairs of the Soviet District of Gomel, where a record stating that he had committed an administrative offence under article 23.34, part 2, of the Code of Administrative Offences (breach of the order for organization or conduct of a mass action or picket) was drawn up. On the same day, the Soviet District Court in Gomel found the author guilty of having committed an administrative offence under article 23.34, part 2, of the Code of Administrative Offences and sentenced him to seven days' administrative arrest.

2.4 On 21 March 2008, on appeal, the Gomel Regional Court confirmed the ruling of the Soviet District Court of Gomel; the decision was final and enforceable. The author complained to the Supreme Court and, on 13 May 2008, a Deputy Chairperson of the Supreme Court rejected his request to have the case examined under the supervisory review proceedings. In his reply, the Deputy Chairperson specifically referred to article 8 of the Law on Mass Events and the fact that the leaflets in question were printed and distributed in the absence of official permission to organize a public debate with Mr. Milinkevich in Gomel.

2.5 The author observes that article 8 of the Law on Mass Events prohibiting the announcement in mass media of the date, venue and time of holding of a mass action and the preparation and distribution of the leaflets, posters and other materials for this purpose before the receipt of authorization to hold the mass action in question does not meet the requirement of necessity: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals, as required by article 19, paragraph 3, of the Covenant. He notes that article 35 of the Belarus Constitution guarantees the right to hold assemblies, rallies, street marches, demonstrations and pickets, provided they do not disturb law and order or violate the rights of other citizens; this article also stipulates that the procedure for conducting the above events shall be determined by law. According to the author the law in question — the Law on Mass

Events and its article 8 in particular — is incompatible with the requirements of articles 19 and 21 of the Covenant.

The complaint

3. The author claims to be a victim of violations by the State party of his rights under article 19, paragraph 2, and article 21; both read in conjunction with article 2 of the Covenant, as the authorities have effectively deprived him, without justification, of the right to freedom of expression and the right of peaceful assembly.

State party's observations on admissibility and merits

4.1 By note verbale of 19 February 2008, the State party explained that under article 35 of the Constitution, the freedom to hold assemblies, rallies, street processions, demonstrations, and pickets which do not disturb the law and order and do not violate the rights of the other citizens is guaranteed by the State; the procedure for conducting such events shall be determined by law. The 1997 Law on Mass Events sets up such a procedure and is aimed at creating conditions for the realisation of the citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on the streets, in squares and at other public locations.

4.2 The State party recalls that on 18 April 2006, the Zheleznodorozhny District Court of Gomel found the author guilty under article 167-1 of the Code of Administrative Offences for having breached the procedure for organizing a meeting and he was sentenced to 10 days of administrative arrest. This decision was confirmed by the Gomel Regional Court on 23 May 2006.

4.3 On 13 February 2008, the Court of the Soviet District in Gomel sentenced the author to 7 days of administrative arrest, for having breached article 23.34, part 2, of the Code of Administrative Offences (non-respect of the procedure for organizing a meeting). On 21 March 2008, this decision was confirmed on appeal by the Gomel Regional Court. On 13 May 2008, a Deputy Chairperson of the Supreme Court rejected the author's request to have the case examined under supervisory review proceedings.

4.4 The State party points out that, under article 12.11 of the Procedural-Execution Code of Administrative Offences, requests to have a final decision examined under supervisory review proceedings shall be submitted within sixth months after the adoption of the final decision; no claim would be examined after the elapsing of this time limit. The author has thus failed to exhaust available domestic remedies, as he did not seek a supervisory review of his case with the Chairperson of the Supreme Court and the General Prosecutor's Office. The author's contention that supervisory review is not an effective judicial remedy as it does not lead to the re-examination of a case is, according to the State party, a personal opinion of the author, unsupported by evidence. In addition, the author is not consistent, as in 2006, he did not submit a supervisory review complaint, but in 2008, he complained to the Supreme Court under the supervisory proceedings; therefore, the author recognized the effectiveness of the proceedings.

4.5 The State party provides details on the possibility of filing appeals against court decisions concerning administrative offences, including through requests for supervisory review. It maintains that supervisory review proceedings constitute an effective remedy. In this context, the State party explains that, of 2,739 appeals received by the Prosecutor's Office in 2008 against rulings concerning cases of administrative offences, 422 were satisfied. During this period, the General Prosecutor's Office had introduced 105 protest motions to the Supreme Court concerning such cases and 101 of them were satisfied.

4.6 On 26 May 2009, the State party reiterated its previous observations and added that article 8 of the Law on Mass Events forbids any announcements concerning an event that is yet not authorized in the mass media (concerning date, venue, etc.), or to produce related leaflets, posters and other materials. Mr. Katsora was distributing leaflets containing

information concerning a meeting with Mr. Milinkevich in February 2008, prior to receiving authorization for the meeting and for this reason his liability was engaged correctly.

4.7 The State party explains that its laws do not contradict article 21 of the Covenant. It notes that this provision allows for restrictions on the freedom of assembly, if imposed in conformity with the law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. Article 19, paragraph 3, of the Covenant, similarly, permits restrictions to freedom of expression; the restrictions shall be provided by law and necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals. The Covenant's provisions are included in national law. In particular, article 33 of the Constitution guarantees the freedom of opinion, conscience and their free expression. Article 35 of the Constitution guarantees the freedom of assembly and holding of meetings, street processions, demonstrations and picketing which do not breach the public order and rights of others.

4.8 The State party adds that article 23 of the Constitution allows for the restriction of individual rights and freedoms but only in cases provided by law and necessary in the interests of national security, public order, protection of the morals, public health, rights and freedoms of others. Under article 35 of the Constitution protecting freedom of assembly, the procedure for conducting mass events shall be determined by law. The law adopted by the authorities in this connection is the Law on Mass Events (1997). This law established an authorization and not a notification regime. Restrictions can only be imposed if they are provided by law and are in the interest of national security, public order, and protection of morals, health and rights and freedoms of others.

Author's comments on the State party's observations

5.1 On 11 April 2009, the author noted that under article 5, paragraph 2, of the Optional Protocol, individuals must exhaust all available domestic remedies. He recalls that in its case law, the Committee has concluded that supervisory review is not a remedy which shall be exhausted. He did not use all procedural possibilities to file a supervisory review appeal, as he believes that only ordinary appeals lead to a systematic review of a case; according to him, supervisory review does not lead to a re-examination of a case. Thus, according to the author, in both proceedings against him, domestic remedies were exhausted with the examination of his appeals by the Gomel Regional Court, after which the first-instance courts' decisions became enforceable.

5.2 As to the fact that he had appealed to the Supreme Court under the supervisory review proceedings in one of the cases, the author explains that submitting a supervisory review request is a right, not an obligation.

5.3 On 14 November 2009, the author added that the freedoms protected under articles 19 and 21 can be restricted, but only in line with the requirements of article 19, paragraph 3, and/or the second sentence of article 21, of the Covenant. On the other hand, article 2, paragraph 1, of the Covenant requires that each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind. Article 2, paragraph 2, of the Covenant provides that, where not already provided for by existing legislative or other measures, each State party to the Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the Covenant's provisions, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

5.4 In this connection, the author claims that each time when applied in practice, the requirement of article 8 of the Law on Mass Events not to disseminate information, leaflets,

posters, etc., concerning a mass event for which no authorization has yet been received, violates articles 19 and 21, of the Covenant. In his case, the application of article 8 of the above-mentioned law amounted to the limitation of his right to disseminate information and right to peaceful assembly.

5.5 The author further notes that in his case, the courts failed to explain how the limitations of his rights under articles 19 and 21 of the Covenant were justified. Similarly, the State party in its replies has also failed to explain why the limitations on the author disseminating information on a future meeting with a known politician and citizens and information concerning a peaceful assembly were necessary for the purposes of the legitimate aims listed in article 19, paragraph 3, and the second sentence of article 21 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author failed to file an application for supervisory review to the Chairman of the Supreme Court of Belarus and to the Prosecutor's Office, with a supervisory review complaint and that, therefore, he had failed to exhaust available domestic remedies. The Committee further notes the author's explanation that he did not appeal with the Chairman of the Supreme Court of Belarus or the Prosecutor's Office, as supervisory review proceedings do not constitute an effective domestic remedy, even if he had submitted one request which was rejected by a Deputy-Chairman of the Supreme Court in May 2008. The Committee also notes that the State party has not shown whether and in how many cases supervisory review procedures were applied successfully in cases concerning freedom of expression. The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force do not constitute a remedy, which has to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.¹ In the light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

6.4 The Committee considers that the author has sufficiently substantiated his claims under article 19, paragraph 2, and article 21; read together with article 2, paragraph 3, of the Covenant, for purposes of admissibility. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

¹ See, for example, *Vladimir Schumilin v. Belarus*, communication No. 1784/2008, Views adopted on 23 July 2012, para. 8.3.

7.2 The Committee has noted the author's claim that the application of the Law on Mass Events has breached his rights under articles 19, paragraph 2, and 21 of the Covenant. The Committee must thus verify, first, whether the limitation of the author's rights to freedom of expression (right to disseminate information) and the imposition of his administrative arrest for having distributed leaflets concerning two meetings in 2006 and 2008 for which authorization had not yet been given, violated his rights under article 19, paragraph 2, of the Covenant.

7.3 The Committee recalls in this respect its general comment No. 34 (2011) on freedoms of opinion and expression,² in which it stated inter alia that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society and that they constitute the foundation stone for every free and democratic society.³ Any restrictions to freedom of expression must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".⁴

7.4 It further notes the State party's explanation that the author was subjected to an administrative sanction, under national law, for having breached the procedure for the organization and holding of a meeting. The Committee observes that article 19, paragraph 3, of the Covenant provides for certain restrictions only as provided by law and necessary: (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The Committee must thus consider whether the restrictions imposed on the author's right to freedom of expression, even if provided by law, are justified under any of the criteria set out in article 19, paragraph 3.

7.5 The Committee has noted the State party's explanation that the Law on Mass Events is aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of public events on the streets, in squares and at other public locations. It notes, however, that the State party has not supplied any specific indication as to how the restrictions imposed on the authors rights under article 19, paragraph 2, were necessary under article 19, paragraph 3, of the Covenant to achieve any of these purposes. The Committee recalls that it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that, even if a State party introduces a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant.⁵ In the light of the information before it and in the absence of any pertinent explanations from the State party in this connection, the Committee concludes that the imposition of sanctions on the author for the distribution of leaflets by himself and others informing the population about a planned, albeit not yet authorized, mass meeting without indicating time and location and announcing a forthcoming debate by a former presidential candidate cannot be considered as restrictions of the exercise of the author's freedom to seek, receive and impart information and ideas that could be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others. Accordingly, the Committee concludes that, in the

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

³ *Ibid.*, para. 2.

⁴ *Ibid.*, para. 23.

⁵ See, for example, communication No. 1226/2003, *Viktor Korneenko v. Belarus*, Views adopted on 20 July 2012, para. 10.8.

circumstances of the present case, the author's rights under article 19, paragraph 2, of the Covenant have been violated.

7.6 In the light of this conclusion, the Committee decides not to examine separately the author's claim under article 21 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the reimbursement of the legal costs incurred by the author, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**X. Communication No. 1852/2008, *Singh v. France*
(Views adopted on 1 November 2012, 106th session)***

<i>Submitted by:</i>	Bikramjit Singh (represented by counsel, Stephen Grosz)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	16 December 2008 (initial submission)
<i>Subject matter:</i>	Expulsion of the author from a public school for wearing a <i>keski</i>
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Substantive issues:</i>	Right to manifest one's religion; right to privacy; non-discrimination
<i>Articles of the Covenant:</i>	2, 17, 18, 26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2012,

Having concluded its consideration of communication No. 1852/2008, submitted to the Human Rights Committee by Bikramjit Singh under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Bikramjit Singh, an Indian national of the Sikh faith, born in India on 13 August 1986. He claims to be a victim of violations by France of articles 2, 17, 18 and 26 of the Covenant. He is represented by counsel, Stephen Grosz. The Covenant and its Optional Protocol entered into force for the State party on 4 February 1981 and 17 May 1984, respectively.

1.2 On 20 March 2009, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the case separately.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as submitted by the author

2.1 The facts are related to Act No. 2004-228 of 15 March 2004, which, in conformity with the principle of secularism, covers the wearing in public primary schools, secondary schools and lycées of symbols and clothing manifesting a religious affiliation. This Act has led to the introduction of article L.141-5-1 in the Education Code, under which: "In public primary schools, secondary schools and lycées, the wearing of symbols or clothing by which pupils manifest their religious affiliation in a conspicuous manner is forbidden. Under the rules of procedure, disciplinary procedures shall be preceded by a dialogue with the pupil."

2.2 The circular of 18 May 2004 concerning the implementation of Act No. 2004-228 explicitly states that "the Act does not call into question pupils' right to wear discreet religious symbols". It also establishes that "whenever a pupil who is enrolled at a school arrives with a symbol or clothing which may be prohibited, it is important that dialogue be initiated immediately with the pupil. The school principal shall conduct the dialogue in collaboration with the management team and pedagogical teams, in particular calling upon teachers who know the pupil in question and will be able to help resolve the problem. This is a priority but in no way excludes any alternative which the school principal may deem appropriate in the specific case."

2.3 The author started his studies at the lycée Louise Michel in 2002. He was initially given permission to wear the *patka* and then, after September 2003 at the age of 17, he wore the *keski*. The *keski* is a small light piece of material of a dark colour, often used as a mini-turban, covering the long uncut hair considered sacred in the Sikh religion. It is frequently worn by young boys as a precursor or alternative to a larger turban. The wearing of the turban is a categorical, explicit and mandatory religious precept in Sikhism. It is an essential component of the Sikh identity: to be Sikh is not to cut one's hair and, consequently, to wear a turban. Asking a Sikh to remove his turban is therefore tantamount to asking him to perform an impossible act. The *keski* (like the turban for adult men) is not meant as an external display of faith but is rather intended to protect the long uncut hair, which is considered as a sacred, inherent and intrinsic part of the religion. The turban is not worn with a view to proselytize – a concept which is foreign to the Sikh religion.

2.4 In September 2004, before the start of the academic year, discussions took place between the Schools Inspectorate of Seine-Saint-Denis and representatives of the Sikh community on how the Act of 15 March would apply to Sikh pupils. In September 2004, the author arrived at school in his *keski* as he had done the previous year. The author and his family considered the *keski* as a compromise between, on the one hand, the requirements of his ethnic and religious traditions, and on the other hand, the principle of secularism.

2.5 At first, the principal of the lycée formally prohibited the author from entering the classroom wearing the *keski*. This exclusion was decided without recourse to a disciplinary board. Subsequently, on 11 October 2004, the author was allowed to continue his studies but sitting apart. He was sent to the school canteen, where he studied on his own and where a teaching assistant provided him with school books on request. He received no teaching during the three weeks that he spent in the canteen. This separation was apparently due to continue while the school conducted the dialogue referred to in article 141-5-1, paragraph 2, of the Education Code.

2.6 On 18 October 2004, the author applied to Cergy-Pontoise Administrative Court for interim measures allowing him to attend class normally or, at least, to appear before a disciplinary board. In a ruling dated 21 October 2004, the court ordered the principal of the lycée to convene a disciplinary board. The board was duly convened on 5 November 2004 and issued a ruling for the immediate and permanent expulsion of the author. The reason

for the expulsion was given as follows: “Breach of Act No. 2004-228 of 15 March 2004, insofar as, after the dialogue phase, the pupil refused to remove the head covering which completely covered his hair, thereby manifesting his religious affiliation in a conspicuous manner”.

2.7 The author appealed against the disciplinary board’s decision before the rector of the Créteil education authority. He contested the legality of the decision and the attendant consequences, particularly the lack of a dialogue phase in the sense understood by the law; the improper application of the law and its interpretation as regards removing head coverings, in the sense that the latter could be considered compatible with the terms of the law; and lastly the fact that the school applies the law in such a way that the author is compelled to act contrary to his freedom of conscience. On 10 December 2004, the rector confirmed the permanent expulsion of the author on the ground that his clothing belonged to the category of items which it was prohibited to wear on the premises of public schools under article L.141-5-1.

2.8 On 5 February 2005, the author applied to the Melun Administrative Court to annul the decision of 10 December 2004. The application was rejected on 19 April 2005. He then lodged an appeal before the Administrative Court of Appeal of Paris, which was rejected on 19 July 2005. The author filed for an appeal in cassation before the Council of State, which rejected it in a ruling of 5 December 2007. The Council invoked articles 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, stating that “in view of the importance attached to the principle of secularism in public schools, the penalty of permanent expulsion against a pupil who does not comply with the legal prohibition to wear external symbols denoting religious affiliation is not a disproportionate infringement of the freedom of thought, conscience and religion provided for by article 9 ... nor is the penalty, the aim of which is to encourage compliance with the principle of secularism in public schools without discrimination between pupils’ faiths, opposed to the principle of non-discrimination set forth in the provisions of article 14 of the European Convention”. The Council of State also found that “the arguments whereby the contested decision constitutes discrimination against the Sikh community in France, an ethnic minority and in breach of article 14 of the European Convention ... and violating article 8 of that Convention, are new in cassation and are therefore not admissible”.

2.9 The year following his expulsion, the author continued his studies through a correspondence course with the National Centre for Distance Learning, and then enrolled at the University of Paris Est, where he was allowed to wear the *keski*.

The complaint

3.1 The author alleges violations of articles 17 (arbitrary or unlawful interference in one’s private life) and 18 (freedom of religion), either taken separately or in combination with articles 2 and 26 of the Covenant, on the grounds that he has been subject to discriminatory treatment on account of his religion and/or ethnic origin.

3.2 With regard to the violation of article 18, the author submits that his expulsion from the school for wearing the *keski* constitutes a clear and unjustifiable infringement of his right to freedom of religion, and in particular of his right to manifest his religion. This is clear in the wording of the motives for the expulsion: “Non-compliance with Act No. 2004-228 of 15 March 2004, the pupil having refused to remove the head covering which covered his hair, thereby manifesting his religion in a conspicuous manner”.

3.3 The author maintains that the application of Act No. 2004-288, which resulted in his expulsion from school, was not justified according to any of the legitimate aims recognized in article 18, paragraph 3. The two reasons put forward by the minister before the Council of State were: (a) the law was a response to a worrying increase in tension connected to the

claims of communities, after the Stasi Commission had indicated that identity-related conflicts could become a factor of violence in schools; (b) the law also met the objective of protecting the rights and freedoms of others, so that it aimed to protect students, and particularly younger ones, from the pressures that could be brought to bear on them to oblige them to wear items of clothing that would make them identifiable first and foremost by their religious affiliation.

3.4 The author accepts that, should these concerns be well established, they could be said to pursue the legitimate aims of protecting public order and the fundamental rights and freedoms of others. For an aim to be legitimate, it must be based on objective considerations, such as public order and the freedoms of others, and not on the State's desire for its citizens to profess their faith through specific symbolic gestures to which the State attributes official value. Even if the interference had a "legitimate aim", however, it was not "necessary" as required under article 18, paragraph 3, since it did not meet any pressing social need. The reasons given by the French authorities to justify this interference are not relevant in view of the small number of Sikhs in France, and consequently are not sufficient to justify the interference. Ultimately, the interference is totally disproportionate to the legitimate aim pursued.

3.5 The principle of secularism cannot breach the essence and spirit of the rights and freedoms protected by the Covenant. Although the State inevitably has a certain margin of appreciation when evaluating the need to apply such a principle, the matter must fall within the Committee's purview. The principle of secularism may be considered as a legitimate aim, though not an end in itself, and only to the extent that it serves one or more of the aims set out exhaustively in article 18, paragraph 3, if strictly interpreted.

3.6 There are no more than around 10,000 people in the Sikh community in France. It has historically been peacefully integrated in the country. There is nothing to suggest that there are extreme political movements or unrest in France attributable to Sikhs. There have been no concerns regarding Sikh fundamentalist or militant activities in schools, nor any community-related tensions affecting or involving the Sikh community. The Sikhs have simply found themselves embroiled in a problem that is not of their own making. Forcing a Sikh to remove his *keski* makes his religious affiliation all the more conspicuous in that he will then be displaying his long uncut hair, which clearly reveals his Sikh identity as well as his religious beliefs. In the circumstances, the *keski* is a more discreet measure and amounts to a compromise, in contrast to the traditional full turban.

3.7 Wearing the *keski* can in no way be considered as an act of proselytism. The Sikh community is not involved in any attempt to provoke, proselytize, upset or obstruct the rights of members of their own community, or those of the French community at large.

3.8 Although the *keski* may be worn by either women or men, it is uncommon and not compulsory for it to be worn by women. The issue of using the *keski* for the protection of young girls therefore does not arise. On the other hand, it has not been shown that young Sikh boys (let alone young boys of other religions) feel under pressure when they see other boys wearing the *keski*. It has not been claimed or demonstrated that Sikh students have been forced or obliged to wear the *keski*. The author chose to wear it of his own free will. Nor has it been claimed or demonstrated that allowing Sikh students to wear the *keski* at school (or elsewhere) represents a danger to public safety, order, health or the morals of the population. The French authorities have not argued this to be the case before the courts. Nor has it ever been suggested that the *keski* was a source of tension in any school in France.

3.9 The school administration made no attempt at a concession or reconciliation, unlike the Ministry of Education and the schools inspectorate of Seine-Saint-Denis, which appear to have entered into a constructive dialogue in order to find a compromise that would allow Sikhs to cover their hair with a light, discreet black material (which they would find

acceptable). In addition, the exclusion was total, with no exceptions for certain types of lessons, such as physical education.

3.10 The author feels naked and degraded without his turban. Asking a Sikh to unveil his hair fully in public is akin to constantly reminding him of a feeling of betrayal and dishonour. The context and implementation of Act No. 2004-228 show that the corresponding bill did not mention the Sikh community and that the aims of the law are not in the least related to French Sikh students. The Stasi report was intended above all as a response to the pressure placed on young Muslim girls, who are forced to wear the headscarf or veil against their will, and to the schools which were unsure as to what measures to take in view of the awkward situation. The aim of the report was not to outlaw all manifestations of religious belief, which is why the law allows discreet religious symbols to be worn. Far from promoting peaceful coexistence in schools, however, the law has had the effect of humiliating and alienating certain minorities.

3.11 The application of the law to the author amounted to a substantial and indiscriminate prohibition of religious symbols that was both disproportionate and unnecessary. Following a dialogue with members of the Sikh community, the schools inspectorate of Seine-Saint-Denis recognized the possibility of a proportionate response (such as wearing a discreet accessory made of a light, black material allowing pupils to tie up their hair but uncover their ears, forehead and back of the neck to ensure security in the classroom). The application of the law in this case has had extremely serious consequences for the author, who was expelled from school and was refused training. Moreover, he was denied access to any other academic instruction in the French public school system.

3.12 With regard to article 17 of the Covenant, the author affirms that the application of Act No. 2004-228 in his case constituted a breach of his right to respect for his privacy, honour and reputation, including respect for his identity as a member of the Sikh community. It was a breach of his right to respect for his privacy since it did not recognize, facilitate or allow him to display important aspects of his identity and his Sikh religious and ethnic tradition. He refers back to the argument given above concerning interference and necessity.

3.13 The author considers that he has been a victim of both direct and indirect discrimination on the grounds of his Sikh religion or ethnic identity, in violation of article 2, of his rights under articles 17 and 18 and in violation of article 26 of the Covenant. He was not treated in the same way as the other students wearing discreet articles of faith, as stipulated in the circular. The author wears a discreet article of faith, just as others might wear crosses of a reasonable size, etc. Act No. 2004-228 was also applied more favourably to other students who allegedly wore other (non-religious) symbols. The burden of proof that this less favourable treatment is objectively and reasonably justified rests with the State. The Government of France has not proved in any way whatsoever that it was justified to apply the law to the author or to Sikh students in France. Speculation not founded on any evidence that wearing the *keski* would affect or disturb the educational community in the school cannot constitute an objective and reasonable justification of such treatment. The position of the Government of France therefore constitutes indirect discrimination in violation of articles 2 and 26.

3.14 In addition and from a different angle, it was indirectly discriminatory to apply Act No. 2004-228 to the author. Even if the law is applied to everyone, the right to equal treatment is also violated when, without an objective and reasonable justification, States fail to provide different treatment for persons whose circumstances are substantially different. Although the law did not specifically target Sikh students, it was likely that it would have a disproportionately harmful effect on Sikhs if interpreted in such a way as to prevent Sikh students from wearing the *keski* at school. Forcing a Sikh student to keep his hair uncovered does not do away with the external symbols linking him to his religious, cultural and ethnic

identity, since his uncut hair equally symbolizes this affiliation. In these circumstances, and given that the *keski* is worn as a compromise instead of the full turban, it cannot objectively and reasonably be justified to deny permission to wear it. In this case, the Government of France has failed to introduce appropriate exceptions to the rule for Sikhs, despite the assurances given to the Sikh community.

3.15 The author recalls that in its concluding observations on the fourth periodic report of France, the Committee referred to Act No. 2004-228 in the following terms:

The Committee is concerned that both elementary and high school students are barred by Act No. 2004/228 of 15 March 2004 from attending the public schools if they are wearing so-called ‘conspicuous’ religious symbols. The State party has made only limited provisions — through distance or computer-based learning — for students who feel that, as a matter of conscience and faith, they must wear a head covering such as a skullcap (or *kippah*), a headscarf (or *hijab*), or a turban. Thus, observant Jewish, Muslim, and Sikh students may be excluded from attending school in company with other French children. The Committee notes that respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols. (arts. 18 and 26)

The State party should re-examine Act No. 2004/228 of 15 March 2004 in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one’s religion in public as well as private, as well as the guarantee of equality under article 26.¹

3.16 The author also cites, among others, the concluding observations on the second periodic report of France, in which the Committee on the Rights of the Child notes:

The Committee is also concerned that the new legislation (Law No. 2004-228 of 15 March 2004) on wearing religious symbols and clothing in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education, and not achieve the expected results ...

The Committee recommends that the State party, when evaluating the effects of the legislation, use the enjoyment of children’s rights, as enshrined in the Convention, as a crucial criteria in the evaluation process and also consider alternative means, including mediation, for ensuring the secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children.²

3.17 The author refers to paragraph 10 of Human Rights Committee general comment No. 22 (1993) on the right to the freedom of thought, conscience and religion,³ which states that: “If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.” The author argues that in the current case, the State party’s ideology, namely secularism, should not be imposed in such a way that it impairs, restricts or

¹ CCPR/C/FRA/CO/4, para. 23.

² CRC/C/15/Add.240, paras. 25 and 26.

³ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex VI.*

obstructs the rights of citizens with religious beliefs if it is disproportionate and unnecessary to do so.

3.18 The author requests the Committee to: (a) express the view that his rights under articles 17, 18, 2 and 26 of the Covenant have been violated; (b) recommend that the State party take appropriate measures to address the violations, including the amendment or repeal of Act No. 2004-228 and the payment to the author of compensation for material and moral damages and a sum to cover legal fees incurred both in the domestic courts and in the procedure before the Committee.

State party's submission on the admissibility of the communication

4.1 On 13 March 2009, the State party submitted its observations on the admissibility of the communication. It points out that the author had never raised the issue of any violations of the provisions of the Covenant before the domestic courts. Although it is true that the Committee does not require the author of a communication to refer to specific articles of the Covenant, it is nevertheless important that he should avail himself of one of the fundamental rights enshrined in the Covenant. The case brought by the author before the domestic courts concerned only an alleged violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms but, after the Council of State's decision to dismiss the case, the author did not bring the matter before the European Court of Human Rights. He therefore evidently believed that the European Court's case law would not be in his favour. The State party refers in this respect to the Court's rulings on 4 December 2008 in the *Dogru* and *Kervanci* cases.⁴ If the author believes that the Covenant is different, and especially article 18, which is admittedly worded slightly differently from article 9 of the European Convention and the Committee's case law on the issue, he should have mentioned that fact before the domestic courts under the subsidiarity principle. In these circumstances, the State party requests the Committee to declare the communication inadmissible under article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.

4.2 With regard to the complaint of a violation of article 17 of the Covenant, the State party considers that the author has not exhausted all domestic remedies considering that he is filing the complaint before the Committee for the first time. The author did not give the domestic courts the opportunity to rule on the possible violation of his private life, despite the fact that he was represented by counsel. Before the trial courts, he merely alleged that the sanction against him violated articles 9 (freedom of thought, conscience and religion) and 14 (prohibition of discrimination) of the European Convention, claims which were dismissed both by the Melun Administrative Court and the Paris Administrative Court of Appeal. The complaint of a violation of article 8 of the European Convention protecting the private life of individuals, taken separately or in combination with article 14, was first raised before the Council of State, which deemed it inadmissible. It is indeed established legal practice that, in principle, parties can only take up issues before a court of cassation which they have already raised before the trial courts. In addition, the arguments regarding a lack of knowledge of the European Convention are not mandatory and therefore do not have to be raised ex officio by the court judging the abuse of authority. Such arguments are therefore inadmissible if they are invoked for the first time before the court of cassation. Consequently, the State party requests the Committee to declare this part of the communication inadmissible under article 2 of the Optional Protocol.

⁴ Cases of *Dogru v. France* (application No. 27058/05) and *Kervanci v. France* (application No. 31645/04), judgments of 4 December 2008.

4.3 The author also contends, without in fact referring to any specific clause of the Covenant, that his permanent expulsion from the lycée denied him the right to education. Assuming that he had been intending to raise this argument, the State party believes that this part of the communication should also be declared inadmissible on the grounds that domestic remedies have not been exhausted, since the complaint has not been raised before the domestic courts.

4.4 Lastly, the State party calls on the Committee to consider the author's submissions regarding the payment of damages inadmissible. He never made such requests to the domestic courts and has therefore not exhausted domestic remedies. Furthermore, these requests, which do not even come with supporting documents, in any case fall outside the Committee's competence, since, under article 5 of the Optional Protocol, "the Committee shall forward its views to the State party concerned and to the individual". This is a way for the Committee to invite States parties in principle to take steps to provide compensation for the victim. The rare occasions it actually requested compensation for the victim of a violation arose in very specific cases unlike the present one (such as enforced disappearances), and even then the Committee did not specify either the amount or the specific terms of compensation, which were left to the discretion of the State.

State party's submission on the merits of the communication

5.1 On 23 June 2009, the State party submitted its observations on the merits of the communication. It pointed out that since the passing of the Act of 9 December 1905, France is governed by the separation of the church and the State, which enables the State to guarantee the free practice of religion and, hence, the right of each person to worship and to join cultural associations, but without the State recognizing any particular religion. This concept of separation, or secularism, allows people from different faiths to coexist peacefully, while preserving the neutrality of the public domain. Religions are therefore in principle protected, because the only restrictions on religious practices are those imposed by laws that apply equally to everyone, and by respect for secularism and the neutrality of the State.

Complaint of violation of article 18

5.2 Act No. 2004-228 was passed following a national debate, as a means of putting an end to the tensions and incidents sparked by the wearing of religious symbols in public primary and secondary schools and to safeguard the neutrality of public education, in the interest of pluralism and the freedom of others. Its scope and purpose are strictly limited. Firstly, the prohibition is not general but only applies to pupils aged from around 6 to 18 years, who are enrolled in a public school, and exclusively for the period of time that they are on the school premises. It does not apply to private education institutions or to higher education. Secondly, the prohibition is not systematic but affects only symbols and clothing worn for a religious reason and which conspicuously display this religious affiliation. The prohibition therefore applies to symbols which are immediately recognizable as being worn to show religious affiliation, such as the Islamic veil, whatever name it comes under, the *kippa*, crosses of clearly excessive size and symbols whose religious character can be inferred from the pupil's behaviour. The prohibition does not extend, however, to discreet religious symbols, such as a small cross, medallion, Star of David or a hand of Fatima. The law neither stigmatizes nor favours any particular religion and does not contain lists of prohibited religious symbols. The implementing circular merely cites a few examples as guidelines of religious symbols manifesting a religious affiliation in a conspicuous manner and should not be regarded as an exhaustive and restrictive list of such symbols. The fact that only the Islamic veil, the *kippa* and crosses of clearly excessive size are enumerated does not mean to say that the Sikh turban should be excluded from the list. In the case law of the Council of State, decisions are made on a case-by-case basis to verify the enactment

of the law by school administrations and to monitor compliance with the principle of equality of all before the law.

5.3 The law establishes that a phase of dialogue with the offender is a mandatory preliminary step before any disciplinary procedures may be instituted against him or her. Lastly, pupils suspended under this law are not denied access to education and training. Their cases must be notified to the rector or the education inspector so that they may be enrolled in another school or public distance learning centre. Pupils always have the possibility of pursuing a private, even religious, form of education, and local authorities will contribute to the cost of this from public funds.

5.4 During the Committee's consideration of the State party's periodic report, the State party stated that the results of Act No. 2004-228 had been generally positive and had not given rise to any serious incidents. The number of pupils who had sought contentious remedies had gradually diminished. The main problem therefore turns out not to be so much the number of incidents but the amount of tension and claims originating from a given religious group.

5.5 The State party cites the case law of the European Court of Human Rights. This case law, which allows States parties to the European Convention some room for manoeuvre, reflects the Court's intention to take account of choices, particularly constitutional and legislative choices, made by States attached to the principle of secularism, while monitoring observance of the rights and freedoms protected by the Convention.

5.6 The State party considers that the terms of article 18, paragraph 3, of the Covenant have been met in the present case.

(a) *The contested measure complies with the law*

5.7 The contested measure had a due legal basis. Before the law was adopted, a national debate took place in which religious authorities and educationalists took part. The Act was implemented by the competent authorities using circulars and rules of procedure, and implementation was preceded and followed by the relevant case law.

(b) *The contested measure pursued a legitimate aim*

5.8 The ban on the author wearing the Sikh mini-turban was intended, in pursuit of the constitutional principle of secularism, as a means of preserving respect for neutrality in public education and peace and order in schools, subject to respect for pluralism and the freedom of others. The legitimacy of this principle cannot seriously be challenged. If the author did not identify with French secularism, he was free to pursue his education in a private or even denominational school, where the Sikh *keski* would cause no problem. It was not a matter of imposing a viewpoint on the author, but only of enforcing the secularist law on public school premises. The 2004 Act helped to defuse the tensions which might potentially have arisen in public primary schools, secondary schools and lycées. The number of incidents reported since it has come into force has decreased, which reflects broad acceptance. The dialogue procedure is working well since the vast majority of cases are settled at that stage. It would run counter to the principle of the equality of all before the law and therefore be discriminatory to treat children belonging to the Sikh religion differently.

(c) *The contested measure was proportionate to its purpose*

5.9 The intention of Act No. 2004-228 in prohibiting symbols or clothing conspicuously manifesting a religious affiliation does not express a response to unrest or a desire to proselytize. On the contrary, the very purpose of the Act was to relax the law as it stood before, which, because it depended to a large extent on the assessment of a pupil's

behaviour or the occurrence of threats to public order, was particularly difficult to apply and led to interpretations which tended to vary from one school to the next. The measure was proportionate to its purpose. Firstly, it applies only to public schools. Secondly, it requires dialogue to be initiated. In this particular case, several interviews were conducted by the principal of the lycée, the rector and the schools inspector. On 6 September 2004, the decision was taken to place the author in a study room under the supervision of a tutor. Thirdly, the decision to expel him permanently was taken as a last resort. No compromise solution could be found since the author persistently refused to stop wearing a turban or mini-turban during compulsory school activities. The author himself put an end to the dialogue phase by filing an application to the Administrative Court on 18 October 2004 requesting readmission to school or, failing this, the holding of a disciplinary board. In the circumstances, the judge could only acknowledge the lack of agreement and order the principal of the lycée to bring the case before the school's disciplinary board. Of the hundred or so Sikh pupils attending school in the Créteil educational area, which includes people of different religious denominations, only three pupils, including the claimant, had lodged an appeal after refusing to stop wearing the turban. In view of the continued disagreement, the schools inspector had drawn up three proposals: (a) enrolment at the National Centre of Distance Learning combined with home tutoring; (b) enrolment in a private school under contract with the State and with similar schooling and teaching conditions to those of a public school; (c) enrolment in a private school with no contract. The families of the three pupils concerned opted for distance learning. The author was able to continue his studies, including at university, according to the official programme without needing to change his dress code. It cannot, therefore, be maintained that the application of the law has had serious and irreversible consequences on his situation.

5.10 In the light of the above, the State party concludes that the author was not a victim of a violation of article 18 of the Covenant, since he must have been aware of the risk of expulsion due to wearing the illegal *keski*, the legislation was justified on the basis of the constitutional principle of secularism and the fundamental freedoms of others in public education, and the means used were proportionate to the ends sought.

Complaint of violation of article 17

5.11 The State party reiterates that the contested measure was neither arbitrary nor illegal. Moreover, the school administration and the teaching staff never disputed the "sanctity" of his hair for the author, nor questioned his right to keep it intact. The State party cannot follow the author's reasoning that Sikh pupils should be treated any differently from Muslim, Jewish or Catholic students. Besides the fact that such an approach would be contrary to the principle of equality before the law and thus discriminatory, it would lead the State to depart from its neutrality and express an opinion on the legitimacy of religious beliefs and their forms of expression. In the case in hand, the administration and then the judge merely provided an objective assessment as to whether or not the symbol denoting religious affiliation worn by the author was conspicuous. Their assessment did not entail any interference with his faith or any judgement regarding the wearing of a turban or mini-turban. The State party therefore concludes that the author was not a victim of a violation of article 17 of the Covenant.

Complaint of violation of articles 2 and 26

5.12 The State party contends that the author was not a victim of a violation of articles 2 and 26 of the Covenant. The author did not suffer any form of discrimination since the law concerns all conspicuous religious symbols, regardless of the religion to which they belong. He does not show evidence that there was any indirect discrimination arising under Act No. 2004-228. The State party cannot therefore accept his arguments that would imply the need to allow an exception on the basis of affiliation to a particular religion, in breach of the

provisions of the Covenant. It is not up to the Committee to determine whether the Sikh turban has “more” religious significance than the Islamic veil or the *kippa* and whether the law should therefore exempt only pupils belonging to the Sikh religion. Contrary to what the author maintains, no assurance to that effect was ever given to the Sikh population. The Government has discussed the matter with representatives of the Sikh population, as well as representatives of other religions, in order to clarify the terms and scope of the law and find compromise solutions.

Author’s comments on the State party’s submission

6.1 On 28 August 2009, the author submitted comments on the State party’s observations on the admissibility and merits of the communication.

6.2 Regarding the State party’s observations alleging the non-exhaustion of domestic remedies, the Council of State ruled as the court of last instance. There were therefore no other legal remedies possible. The author had essentially already filed before the domestic courts all the complaints which he has brought before the Committee since the start of legal proceedings. If there have been any omissions in this respect, they are minor and trivial, given that the substantive issues, on which the proceedings are based, have never been in any doubt. The facts as submitted by the author in his communication are hardly contested. It is unimportant that the author specifically mentioned his rights under the European Convention during the domestic proceedings rather than the equivalent rights enshrined in the Covenant. They are substantially identical. The right to education has always been at the heart of his application.

6.3 Lastly, there is no obligation to initiate proceedings if they are bound to fail. In the light of the ruling by the Council of State, it cannot really be suggested — and the State party does not suggest this — that there would have been a different outcome if the author had raised questions which according to the State party he did not raise.

6.4 Pursuant to article 2, paragraph 3, of the Covenant, the State party has the obligation to guarantee the author an effective remedy, including compensation. The appeal before the domestic courts was administrative and was designed to invalidate the contested measure. Once the domestic courts had confirmed the lawfulness of the author’s permanent expulsion, it was no longer possible to claim for damages.

6.5 Concerning the State party’s observations on the merits, the author argues that the State party’s ideology, namely secularism, should not be imposed in such a way that it impairs, restricts or obstructs the rights of citizens holding different religious beliefs whenever it is disproportionate and unnecessary to do so. European case law has not considered the necessity and the proportionality of Act No. 2004-228 as applied in the case of *Jasvir Singh v. France*.⁵ The State party has failed to provide real justifications, either in the *Jasvir Singh* case before the European Court or in the current case.

6.6 With regard to the complaints under article 18, the author does not dispute that the measures are prescribed by law. He also agrees that they would be justified provided that they had a legitimate aim and were proportionate to this aim. However, the State party has not established such justifications in the specific circumstances of this case. The State party has not produced any evidence that the Sikh community posed a threat to public safety, order or health, or that the fundamental rights of others were affected in any way, through the wearing of a turban, *keski* or other head covering. A State cannot declare that a principle or official policy is a legitimate aim when there is no evidence of an objective and tangible impact, such as civil disorder, criminality or the violation of the rights of others. The

⁵ European Court of Human Rights, application No. 25463/08, decision of 30 June 2009.

principle of freedom of religion has not been offset against that of secularism. Secularism prevails regardless of any consideration of how it may be applied in accordance with article 18. The total absence of any threats to public order, health and safety or to the fundamental rights of others must be given due weight when the need for measures under article 18, paragraph 3, is assessed. The only unrest affecting the Sikh community in France is that which has arisen because of Act No. 2004-228.

6.7 When there are no specific risks as a result of an author manifesting his religion or beliefs, the Committee should be careful before concluding that there is a need to interfere in such matters. The State party tries to show that the interference is limited in three ways: it occurs exclusively in public schools; it affects only pupils aged between 6 and 18; and it is restricted to symbols which manifest a religious affiliation in a conspicuous manner. Yet in this case, the State party has not demonstrated that the intervention is necessary. Since the author's uncut hair reveals that he is a Sikh, there is only one conceivable obligation, namely that the hair should be covered discretely, as was done with a light material of a dark colour in the form of a *keski*. This compromise has not been properly appreciated.

6.8 The State party places too much emphasis on the dialogue requirement stipulated by the Act. This requirement is unimportant since the Government's position is clearly that no compromise is possible. The assessment report published a year after the law came into effect shows that it had a considerable impact on the small Sikh community in France. Five children were expelled. The students who were not suspended were considerably younger and were prepared to wear clothing over their hair, while others either went to school bare-headed, took correspondence courses or cut their hair. If there have been fewer cases filed by Sikh pupils since the adoption of the law, it is probably because the law restricted their right to a French education if they did not cut their hair, or because they had no other viable alternative (since private education is not affordable by all) than to obey a draconian law. In this particular case, distance learning proved difficult for the author and not at all as good as the education at the school from which he had been excluded. As a result, he had to repeat his final year at a Catholic school, thus in effect losing one year of study.

6.9 Addressing the complaints under article 17, the author argues that the very fact that his hair which, according to his faith, must be kept clean and tidy as a sign of respect and not simply left loose and dishevelled, is uncut, renders his affiliation with the Sikh religion apparent regardless of whether the hair is covered or not.

6.10 With regard to the complaints under articles 2 and 26, the author contends that the law has had a damaging effect on Sikhs and certain other religions. Unlike Sikhism (or Judaism or Islam), Christianity (the main religion in France) does not require symbols to be worn. In fact, the law is therefore prejudicial only to the Sikhs and the followers of other non-Christian religions that require symbols to be worn which the law characterizes as conspicuous. The Committee is invited to conclude that Act No. 2004-228, although apparently neutral, is in reality indirectly discriminatory. The State must therefore justify this discriminatory effect. It must establish that the law pursues a legitimate aim and that the discriminatory effect is proportionate to this aim. In the present case, the discriminatory measure was neither objective nor reasonable.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the question of the exhaustion of domestic remedies, the Committee takes note that the author has sought legal remedy before all the competent administrative and judicial authorities, including the Council of State. The latter concluded that the decision under appeal did not misinterpret articles 9 and 14 of the European Convention. The Committee recalls that for the purposes of the Optional Protocol, an author is not required to cite specific articles of the Covenant before domestic courts, but need only invoke the substantive rights protected under the Covenant. The Committee notes that, in the domestic courts, the author alleged violations of the right to freedom of religion and of the principle of non-discrimination, which are protected under articles 2, 18 and 26 of the Covenant. The Committee is therefore not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering the case on its merits.

7.4 With regard to the complaint of a violation of article 17 of the Covenant, the Committee observes that the author raised the issue of the violation of his right to privacy only during the appeal in cassation before the Council of State. In accordance with domestic law, the Council thus declared the remedy inadmissible. In the circumstances, the Committee considers that the domestic remedies regarding the alleged violation of article 17 of the Covenant have not been exhausted and therefore declares the complaint inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 The Committee considers that the author's claims under articles 18 and 26 met all admissibility criteria and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee must rule on the author's allegation that his expulsion from school for wearing the *keski* is an infringement of his rights to freedom of religion, and in particular, his right under article 18 of the Covenant to manifest his religion. In the author's view, this measure would not be justified as the State party has not produced any evidence that the Sikh community posed a threat to public safety, order, health or morals, or that the fundamental rights of others were affected in any way through the wearing of a turban, *keski* or other head covering. In this regard the Committee takes note of the State party's assertion that Act No. 2004-228 was passed following a national debate as a means of putting an end to the tensions and incidents sparked by the wearing of religious symbols in public primary and secondary schools and to safeguard the neutrality of public education in the interest of pluralism and the freedom of others. The purpose of the Act was to modify the previous state of the law, which, because it depended to a large extent on the assessment of a pupil's behaviour or the occurrence of threats to public order, was particularly difficult to apply and led to interpretations which tended to vary from one school to the next. The Committee also notes the State party's view that the contested measure therefore pursued a legitimate aim, namely, in pursuit of the constitutional principle of secularism (*laïcité*), to preserve respect for neutrality in public education and peace and order in schools. The Committee further notes the State party's affirmation that the contested measure was proportionate to its aim, insofar as it applied only to public schools and required a dialogue to be initiated between the pupil and the school authorities. In this particular instance, several interviews were conducted by the principal of the lycée, the rector and the schools inspector before the author was definitively expelled.

8.3 The Committee refers to its general comment No. 22 concerning article 18 of the Covenant and considers that the freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings. The fact that the Sikh religion requires its male members to wear a turban in public is not contested. The wearing of a turban is regarded as a religious duty for a man and is also tied in with a person's identity. The Committee therefore considers that the author's use of a turban or a *keski* is a religiously motivated act, so that the prohibition to wear it under Act No. 2004-228 constitutes a restriction in the exercise of the right to freedom of religion.

8.4 For the purpose of determining the present communication, the Committee focuses on the compatibility with article 18 of the Covenant of the application of the Act in the particular circumstances of this communication.

8.5 The Committee must determine whether the limitation of the author's freedom to manifest his religion or beliefs (art. 18, para. 1) is authorized under article 18, paragraph 3, of the Covenant. In particular it is the responsibility of the Committee to decide whether that limitation is necessary and proportionate to the end that is sought, as defined by the State party. The Committee reaffirms that the State may restrict the freedom to manifest a religion if the exercise thereof is detrimental to the stated aim of protecting public safety, order, health or morals or the fundamental rights and freedoms of others.

8.6 The Committee recognizes that the principle of secularism (*laïcité*) is itself a means by which a State party may seek to protect the religious freedom of all its population, and that the adoption of Act No. 2004-228 responded to actual incidents of interference with the religious freedom of pupils and sometimes even threats to their physical safety. The Committee therefore considers that Act No. 2004-228 serves purposes related to protecting the rights and freedoms of others, public order and safety. Moreover, the Committee notes that the State party does not contend that secularism (*laïcité*) inherently requires that recipients of Government services avoid wearing conspicuous religious symbols or clothing in Government buildings generally, or in school buildings in particular. Rather, the regulation was adopted in response to certain contemporary incidents.

8.7 In the present case the Committee notes the author's statement, not challenged by the State party, that for Sikhs males, wearing a *keski* or turban is not simply a religious symbol, but an essential component of their identity and a mandatory religious precept. The Committee also notes the State party's explanation that the prohibition of wearing religious symbols affects only symbols and clothing which conspicuously display religious affiliation, does not extend to discreet religious symbols and the Council of State takes decisions in this regard on a case-by-case basis. However, the Committee is of the view that the State party has not furnished compelling evidence that, by wearing his *keski*, the author would have posed a threat to the rights and freedoms of other pupils or to order at the school. The Committee is also of the view that the penalty of the pupil's permanent expulsion from the public school was disproportionate and led to serious effects on the education to which the author, like any person of his age, was entitled in the State party. The Committee is not convinced that expulsion was necessary and that the dialogue between the school authorities and the author truly took into consideration his particular interests and circumstances. Moreover, the State party imposed this harmful sanction on the author, not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct. In this regard, the Committee notes the State party's assertion that the broad extension of the category of persons forbidden to comply with their religious duties simplifies the administration of the restrictive policy. However, in the Committee's view, the State party has not shown how the sacrifice of those persons' rights is either necessary or proportionate to the benefits achieved. For all these reasons, the Committee concludes that the expulsion of the author

from his lycée was not necessary under article 18, paragraph 3, infringed his right to manifest his religion and constitutes a violation of article 18 of the Covenant.

8.8 Having ascertained that a violation of article 18 of the Covenant occurred, the Committee will not examine the claim based on a separate violation of the principle of non-discrimination guaranteed by article 26 of the Covenant.⁶

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of article 18 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future and should review Act No. 2004-228 in the light of its obligations under the Covenant, in particular article 18.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

⁶ Communication No. 1876/2009, *Singh v. France*, Views adopted on 22 July 2011, para. 8.5.

**Y. Communication No. 1861/2009, *Bakurov v. Russian Federation*
(Views adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	Sergei Bakurov (represented by his wife, Lyudmila Bakurova)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	22 September 2008 (initial submission)
<i>Subject matter:</i>	Unavailability of a jury trial and commutation of the death sentence to life imprisonment
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Right to effective remedy; right to life; prohibition of torture, cruel or inhuman and degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; right to legal assistance; right not to be compelled to testify against himself or to confess guilt; retroactive application of a criminal law providing for a lighter penalty; prohibition of discrimination
<i>Articles of the Covenant:</i>	2; 6; 7; 14; 15; and 26
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2013,

Having concluded its consideration of communication No. 1861/2009, submitted to the Human Rights Committee by Sergei Bakurov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Sergei Bakurov, a Russian national born in 1971, currently servicing a life sentence in the Russian Federation. He claims to be a victim of a violation by the Russian Federation¹ of his rights under articles 2; 6; 7; 14; 15; and 26, of the Covenant. He is represented by his wife, Lyudmila Bakurova.

The facts as presented by the author

2.1 On 22 August 1997, the Krasnoyarsk Regional Court, sitting in a composition of one professional judge and two lay judges, sentenced the author to death with the seizure of property. The author claims that he was not tried by a competent tribunal, as he was deprived of the right, guaranteed under articles 20 and 47 of the Russian Constitution, and article 6 of the Covenant, to have his case examined by a jury.

2.2 Pending the establishment of a jury system in the Russian Federation, the Act on Making Changes and Amendments to the Law of the Russian Soviet Federative Socialist Republic (RSFSR) on the RSFSR judicial system, the RSFSR Code of Criminal Procedure, the RSFSR Criminal Code and the RSFSR Code on Administrative Offences was adopted on 16 July 1993. Paragraph 7, section II, of the Act added a new section 10 to the RSFSR Code of Criminal Procedure "On jury trial". Under paragraph 2 of the decision of the Supreme Council (Parliament) also adopted on 16 July 1993, jury trials were first to be introduced only in five regions of the Russian Federation (Stavropol, Ivanovo, Moscow, Ryazan and Saratov) as of 1 November 1993, and in four other regions (Altai, Krasnodar, Ulyanovsk and Rostov) as of 1 January 1994. This situation remained unchanged by 22 August 1997, when the author's death sentence was handed down. In this regard, the author claims that the unavailability of jury trials in the Krasnoyarsk region at the time of his trial constitutes a violation of article 19 of the Constitution and articles 2, 14 and 26, of the Covenant.

2.3 On 10 June 1998, the author's sentence was upheld by the Supreme Court. The author claims that, although he had not invoked a violation of constitutional provisions in his cassation appeal owing to his ignorance of the law, the Supreme Court was obliged to notice these violations and to quash his sentence.

2.4 On 3 June 1999, the author was pardoned by presidential decree and his death sentence was commuted to life imprisonment. He claims that this was done in violation of article 118 of the Constitution (which establishes that administration of justice in the Russian Federation is carried out only by courts), article 54 of the Constitution² and article 15 of the Covenant, since the 1961 Criminal Code of the RSFSR in force at the time of commission of the crime (July 1994) did not provide for life imprisonment as form of punishment, the maximum imprisonment for the crime he committed being 15 years or the death penalty.

2.5 Upon the request of the Moscow City Court, and on the basis of the complaints of three prisoners, the Russian Constitutional Court examined the constitutionality of paragraphs 1 and 2 of the resolution of 16 July 1993. On 2 February 1999, the Constitutional Court found that part of paragraph 1 of the resolution (which provided for the realization of a right, afforded to all persons accused of an offence for which the death

¹ The Optional Protocol entered into force for the State party on 1 January 1992.

² Article 54 (retroactive laws) reads: (1) The law instituting or aggravating the liability of a person has no retroactive force; (2) No one may be held liable for an action which was not recognized as an offense at the time of its commitment. If liability for an offence has been lifted or mitigated after its perpetration, the new law applies.

penalty was prescribed, to have their cases examined by a jury initially only in nine regions and not on the entire territory of the Russian Federation) was contrary to articles 19, 20 and 46 of the Constitution. The Court held that paragraph 1 of the decision of 16 July 1993 could no longer be used as a ground for refusing the petition of an accused person liable to the death penalty to have his case examined by a jury. Such individuals should be afforded the possibility to have their case examined by a jury. Between the Constitutional Court's decision of 2 February 1999 and the entry into force of a federal law providing for such a right to trial by a jury, the death penalty could not be imposed by a court of any composition (jury, three professional judges or one professional judge and two lay judges). The author claims that the competent court was obliged to bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999. This was not done, however, and he did not petition the court to initiate a review procedure because of his ignorance of the law.

2.6 In early 2006, the author learned about the decision of the Zlatoust City Court of the Chelyabinsk region of 28 January 2001 whereby the death sentence of another prisoner "was brought into compliance with the Constitutional Court's decision of 2 February 1999". The author was told that the latter decision was a precedent that he could use in order to petition a competent court concerning his case. On an unspecified date, the author filed such a petition to the Sol-Iletsk District Court of the Orenburg region which rejected his petition on 28 June 2006 for lack of jurisdiction, explaining that the matter fell under the jurisdiction of the Presidium of the Supreme Court. The author claims that this decision violated his rights under articles 2, 14 and 26 of the Covenant, as this court was at the same level in the hierarchy of courts as the Zlatoust City Court of the Chelyabinsk Region and it should be deemed to have the same authority as the latter to bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999. On an unspecified date, the author filed a petition with the Presidium of the Supreme Court, who rejected it on 7 August 2007.

The complaint

3.1 The author claims that the above facts constitute violations by the State party of his rights under articles 6, 7 and 15, of the Covenant.

3.2 He further claims that the decisions of the Supreme Court (7 August 2007) and the Krasnoyarsk Regional Court (22 August 1997) indicating that the consideration of death penalty cases by a jury had not been introduced in the Krasnoyarsk region, whereas such cases were being examined by a jury in nine other regions of the Russian Federation, violated his rights under articles 2, 14 and 26, of the Covenant.

State party's observations on admissibility and merits

4.1 By note verbale of 17 April 2009, the State party submitted that the decisions adopted in the author's case were in compliance with its international obligations and domestic legislation, and that his allegations are unfounded. The author was sentenced to death on 22 August 1997 by the Krasnoyarsk Regional Court. His case was considered by a court composed of one professional judge and two lay judges. With regard to the author's claim that his case should have been considered by a jury, the State party refers to section 2 "Final and Transitional Provisions", part 6, of the Constitution. According to these provisions, until the entry into force of the federal law setting out the procedure for the examination of cases by a jury, the previous procedure of examination of that category of cases by courts is preserved. At the time of examination of the author's criminal case, the trial by a jury had not been introduced in the Krasnoyarsk Region. Therefore, his case was considered by a competent, independent and impartial tribunal established by law.

4.2 The State party submits that the author's reference to decision No. 3-P of the Constitutional Court of 2 February 1999 is also unfounded. According to this decision, no accused could be sentenced to death independently of whether his case had been examined by a jury or by a panel of three professional judges or by one professional judge and two lay judges from the moment of its entry into force (2 February 1999) and until such time as the application throughout the Russian Federation of the federal law providing to any accused of a crime for which the federal law establishes death penalty as an exceptional punishment the right to have his case examined by a court with the participation of a jury. However, the author was convicted before the entry into force of this decision.

4.3 The State party also contests the author's claim that the president exercised arbitrarily his right to pardon and that his death sentence could not be commuted to life imprisonment, since pursuant to article 102 of the Criminal Code of the RSFSR, the alternative maximum sentence for the crime he committed was 15 years' imprisonment. The State party submits that the right to pardon is exclusively the prerogative of the president in his capacity as the head of State, and is enshrined in the Constitution (art. 89 (c)).³ Pardon is not linked with the issue of criminal responsibility and determination of a sentence. The presidential decree pardoning the author was adopted pursuant to article 59, part 3, of the Criminal Code, according to which the death sentence as a result of pardon may be commuted to either life imprisonment or 25 years' imprisonment.

4.4 The president did not lower the author's sentence in view of the publication of a new law imposing a lighter penalty for the crime he had committed, but replaced his sentence to a lighter one. In this case, the commutation of the author's sentence was not decided as part of the criminal proceedings requiring compliance with the provision of article 54 of the Constitution on the non-retroactivity of a law providing for a heavier penalty, but in the exercise of his constitutional right to pardon. According to the legal position established by the Constitutional Court in its ruling No. 61-O of 11 January 2002, pardon as an act of mercy cannot lead to consequences that are heavier for the convict than those that were established for by the criminal law and decided by a court on a specific case. The commutation of the death sentence to a lighter sentence under the criminal law in force (in the author's case – to life imprisonment) as a result of a pardon cannot be considered as worsening the convict's situation. Therefore, neither the court decisions nor the presidential decree No. 698 of 3 June 1999 violate domestic legislation, international legal norms in the sphere of human rights and freedoms or the author's rights and interests.

Author's comments on the State party's observations

5.1 On 15 June 2009, the author claims that the right of persons accused of crimes for which the federal law institutes capital punishment to have their cases considered by a jury, as set out in article 20, paragraph 2, of the Constitution, has been guaranteed on the territory of the Russian Federation following the adoption of the resolution of the Supreme Council of the Russian Federation of 16 July 1993. He further reiterates that, at the time of examination of his criminal case, trial by jury had not been introduced in the Krasnoyarsk region. Therefore, his case was not considered by a competent tribunal, in violation of article 14 of the Covenant. He also claims that he was not explained the meaning of article 51 of the Constitution (right to remain silent)⁴ which lead to a violation of his right to defence and the right not to be compelled to testify against himself or to confess guilt under article 14, paragraph 3(g), of the Covenant.

³ Lit. "b" in original Russian.

⁴ Article 51 of the Russian Constitution reads that: (1) No one shall be obliged to give evidence against himself or herself, his or her spouse and close relatives, the range of which shall be established by the federal law; (2) The federal law may stipulate other exemptions from the obligation to give evidence.

5.2 The author challenges the State party's argument that the decision No. 3-P of 2 February 1999 is not applicable to his case. He claims that, although he was convicted before its entry into force, the decision had a retroactive effect. He rejects the State party's argument that the presidential decree does not go beyond the sanctions provided for in the Criminal Code of the RSFSR; the decree commuted his death sentence to life imprisonment, and under federal law this harsher penalty is applicable to particularly grave crimes, whereas the crime he committed in 1994 under article 102 of the Criminal Code of RSFSR belonged to the category of grave crimes.

Additional observations by the State party

6.1 By a note verbale of 13 August 2010, the State party rejects as unfounded the author's claim under article 14 of the Covenant that his criminal case was not considered by a competent tribunal. Article 47, paragraph 1, of the Constitution guarantees that no one may be denied the right to having his or her case reviewed by the court and the judge under whose jurisdiction the given case falls under the law, meaning that the consideration of cases shall be carried out by a composition of a court established by law. The author's sentence was handed down on 22 August 1997 by a panel of one professional judge and two lay judges. Such a composition of the court was dictated by the fact that at that time trial by jury had not been introduced on the territory of the Krasnoyarsk region. Under article 420 of the Code of Criminal Procedure of the RSFSR, the regions in which jury trials were established were determined by the Supreme Council of the Russian Federation and such regions were designated by the Supreme Council in its decision of 16 July 1993. According to paragraphs 1 and 2 of the decision, the examination of those criminal cases concerning offences for which a death sentence could have been imposed by a court with the participation of a jury was introduced initially only on the territory of nine regions of the Russian Federation; Krasnoyarsk region was not one of them.

6.2 The State party reiterates its previous observations (see paras. 4.1 and 4.2 above) and submits that the author's communication is based on a wrong interpretation of the temporal application of the decision No. 3-P of the Constitutional Court of 2 February 1999, claiming that it has retroactive effect. The State party explains that, when examining the issue regarding the right of persons accused of a crime for which the federal law establishes the death penalty to have their cases examined by a court with the participation of a jury, the Constitutional Court was concerned at ensuring for citizens the equal right to have their cases examined by a court with the participation of a jury on the entire territory of the Russian Federation and did not address the matter of constitutionality of the death penalty as category of punishment. The Court found the application of the provisions introducing jury trials not on the entire territory of the country contrary to the Constitution and declared them void. Prior to the adoption of the Court's decision, the said provisions, in accordance with section 2 "Final and Transitional Provisions", part 6, of the Constitution, were integral part of the legal system of the Russian Federation and with regard to the transitional period were viewed as complying with the Constitution (ruling No. 284-O-O of the Constitutional Court of 15 April 2008). Paragraph 5 of the operative part of the decision No. 3-P makes it clear that the imposition of death penalty was no longer permissible in the Russian Federation following the adoption of the decision, i.e. after 2 February 1999 (ruling No. 68-O of the Constitutional Court of 6 March 2001). Since the Constitutional Court did not decide that its decision No. 3-P has retroactive effect, death sentences handed down prior to its entry into force are not subject to review on this basis.

6.3 Furthermore, in its decision No. 3-P, the Constitutional Court did not exclude from the categories of criminal sanctions either the death penalty or life imprisonment and did not declare unlawful the commutation of a death sentence to life imprisonment as a result of a pardon (ruling No. 568-O of 21 December 2006). Pardon operates independently and does not require the adoption of a court decision for its enforcement, it is applied outside the

framework of administration of justice in criminal cases and, by virtue of its intended purpose, it cannot be considered as worsening the convict's situation and precluding him from exercising his right to have his plight eased, including when, following the pardon, the responsibility for the crime committed is lifted or mitigated by a new criminal law. This legal position has been confirmed by the Constitutional Court in a number of rulings (Nos. 406-O of 11 July 2006, 567-O of 21 December 2006 and 111-O-O of 21 February 2008).

6.4 The State party explains that the Criminal Code's provisions on commutation of one's death sentence to life imprisonment or deprivation of liberty for a specified period as a result of pardon, do not preclude the application of a new criminal law that mitigates or eliminates the criminal responsibility for a committed crime, including at the stage of servicing the sentence and taking into account the act of pardon. Therefore, these provisions are not contrary to the principle enshrined in article 54, paragraph 2, of the Constitution.⁵

6.5 The State party observes that the author's main argument is based on his interpretation that, since the death penalty was outlawed by a decision of the Constitutional Court, the sanction of the crime provided for in article 102 of the Criminal Code of the RSFSR allegedly became lighter (up to 15 years' imprisonment) than the sanction which had been imposed on him as a result of the pardon and therefore, in violation of the principle of non-imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed (art. 15, para. 1, of the Covenant). The State party reiterates that the constitutionality of the establishment by federal lawmakers of the death penalty as an exceptional measure of punishment was not addressed by the Constitutional Court, therefore there are no grounds for considering that the death penalty was abolished or excluded as form of criminal punishment from the criminal law and, consequently, that the author's case is subject to review. In light of this, the imposition of life imprisonment instead of death penalty cannot be considered as worsening the author's situation.

6.6 The State party further submits that the author's allegations under article 14, paragraph 3, of the Covenant are erroneous. As it transpires from the materials of his criminal case, the author and his co-defendants claimed that the evidence was fallacious because their rights as suspects and accused under article 51 of the Constitution had not been explained to them.⁶ This allegation had been examined by the court of first instance and was declared unfounded. According to the judgment of the first instance court of 22 August 1997, all investigating officers who conducted the preliminary investigation had been summoned and testified in court, and confirmed that the meaning of article 51 of the Constitution had been explained to all of the accused, including the author. In addition, the text of the said provision was typewritten in advance on the standard form explaining to them their right to defence. Moreover, upon the lawyers' motion, the court ordered a forensic-technical examination of those procedural documents, which concluded that the text of article 51 of the Constitution had been typed in advance on the standard forms explaining to the accused their right to defence. This conclusion refutes the author's allegation that the text of article 51 was typed in the forms only after he had been acquainted with all the materials of the case file pursuant to article 201 of the Code of Criminal Procedure of the RSFSR. Furthermore, the author certified with his signature that his rights had been explained to him, including the rights set out in article 51 of the Constitution (vol. 6, p. 142, of the criminal file).

⁵ According to article 54, paragraph 2, of the Constitution, no one may be held liable for an action which was not recognized as an offence at the time when it was committed. If liability for an offence has been lifted or mitigated after it had been committed, the new law shall apply.

⁶ See footnote 4 above.

6.7 With regard to the temporal application of legal norms, the State party submits that the Committee should take into account the official interpretation of this matter by domestic courts, including the legal position of the Constitutional Court, more so since the author relies on its decisions in substantiation of his allegations.

Further submissions by the author

7.1 On 11 November 2010, the author adds that the court committed a number of procedural violations when examining his cassation appeal. For example, it failed to exclude evidence obtained in violation of the criminal procedure norms. He reiterates that he was never informed of his right under article 51 of the Constitution, and as a result he gave self-incriminating evidence. He submits that evidence obtained in violation of federal laws cannot serve as a basis for the accusation nor can it be used as evidence. He also refers to article 50, paragraph 2, of the Constitution and to the decision No. 8 of 31 October 1995 of the Supreme Court on the admissibility of evidence in the administration of justice.

7.2 The author reiterates that his death penalty was commuted to life imprisonment arbitrarily and the competent authorities refuse to initiate supervisory review proceedings in order to review his death sentence imposed before the adoption of the Constitutional Court's decision No. 3-P of 2 February 1999. He argues that the wording of paragraph 5 of the decision No. 3-P makes it clear that the imposition of the death penalty is prohibited and thus the commutation of his death penalty to life imprisonment as a result of pardon is equally unlawful. He reiterates his argument that article 102 of the Criminal Code of the RSFSR in force at the time of commission of crimes (summer 1994) provided for a sanction of deprivation of liberty of 15 years maximum.

7.3 On 12 May 2011, the author added that the State party signed Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty on 16 April 1997 and claims that, by sentencing him to death, the State party violated its international obligations under article 18 of the Vienna Convention on the Law of Treaties.⁷ He further submits that the judicial power in the Russian Federation is exercised by courts composed of professional judges and claims that he was not tried by a competent, independent and impartial tribunal established by law, since his sentence had been handed down on 22 August 1997 by a panel of one professional judge and two lay judges.⁸

7.4 The author further claims that his cassation appeal was considered in the absence of his lawyer, in violation of his right to defence. He was not informed of his right to invite another lawyer to represent him, and submits that, according to the ruling of the Presidium of the Supreme Court of the Russian Federation No. BVSR 95-6 of 25 May 1994, the right of the accused to defence should be ensured at all stages of the proceedings.⁹

⁷ Article 18 of the Vienna Convention on the Law of Treaties reads: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

⁸ The author refers to the decision of the European Court of Human Rights in *Buscarini v. San Marino* (application No. 31657/96, decision on admissibility of 4 May 2000), where the Court made clear that the phrase "established by law" covers not only the legal basis for the very existence of the "tribunal" but also the composition of the bench in each case.

⁹ In this regard, the author also refers to the judgments of the European Court of Human Rights in *Artico v. Italy* (application No. 6694/74, judgement of 13 May 1980) and *Pakelli v. Germany*

7.5 On 29 November 2011, the author reports that the Supreme Court rejected his application for supervisory review on 23 November 2010, ignoring, inter alia, his allegation under article 14, paragraph 3 (d), of the Covenant.

Additional submissions by the parties

8.1 On 23 January 2012, the State party reiterated its previous observations.

8.2 On 6 April 2012, the author reiterated his allegations under article 14, paragraph 3 (d), of the Covenant, and claims that the failure of the courts to inform him of his right to invite another lawyer to defend him during the cassation proceedings represents a flagrant violation of the Code of Criminal Procedure, this position being confirmed in the ruling of the Presidium of the Supreme Court of the Russian Federation of 25 May 1994 in the case of *Z. v. Russian Federation*, where the court found that the refusal to provide Mr. Z. with effective legal assistance during the cassation proceedings had violated his right to defence.

8.3 On 4 June 2012, the author added that the sentence handed down by the Krasnoyarsk Regional Court on 22 August 1997 should be quashed and the case be remitted for fresh consideration, in particular in view of the fact that his right to have access to a lawyer from the first hours following his apprehension had been restricted, in violation of article 14, paragraph 3 (d), of the Covenant.

8.4 On 17 September 2012, the State party reiterates its previous observations and submits that the author's right to appeal against his sentence was explained to him. He availed himself of this right and filed a cassation appeal that was examined and rejected by the Supreme Court. The author has not requested that the court grant him legal assistance for the purposes of cassation proceedings. Since he was informed about the possibility to have the assistance of a lawyer and he did not exercise this right, his allegations are unfounded.

8.5 The State party points out that the author's claim that the rejection of his supervisory review application by the Supreme Court on 23 November 2010 constitutes a violation of domestic legislation is based on an erroneous interpretation of the temporal application of the criminal procedure norms and on the misinterpretation of the legal position of the Constitutional Court on the matter. The Supreme Court stated in its decision that the preparation for the examination of the author's case in cassation proceedings and the examination itself had been carried out in accordance with the provisions of the RSFSR Code of Criminal Procedure of 1961 (then in force). The Code did not provide for the mandatory participation of a lawyer in the cassation proceedings, such a requirement having only been codified in the Criminal Procedure Code of 2001.

8.6 The State party also submits that the author in his supervisory review application requested the court to review his criminal case in the light of the adoption of ruling No. 255-O-P of the Constitutional Court of 8 February 2007, where the court confirmed the obligation of the cassation court to ensure the participation of a defence counsel in the proceedings in the circumstances specified by law, including at the request of the accused. However, the ruling of the Constitutional Court of 8 February 2007 does not have retroactive effect in respect of the decision of the cassation court of 10 June 1998 adopted in the author's case. Since the courts' decisions in the author's case were issued prior to the adoption of the rulings of the Constitutional Court of 8 February 2007 and he was not part of the constitutional proceedings that lead to the adoption of these rulings, the legal

(application No. 8398/78, judgement of 25 April 1983), where the Court found that, when an accused does not have sufficient means to pay for legal assistance, he is entitled under the Convention to free legal aid when the interests of justice so require.

positions expressed by the Court therein cannot be applied to his case (rulings of the Constitutional Court of 17 November 2011 Nos. 1547-0-0, 1549-0-0, 1610-0-0 and of 21 December 2011 Nos. 1632-0-0, 1777-0-0 and others). Therefore, the author's supervisory review application was rejected lawfully.

8.7 On 5 January 2013, the author adds that he was apprehended on 24 July 1994 on the suspicion of having committed a crime under article 102 of the RSFSR Criminal Code, and that he was detained for more than 80 hours, a period during which several investigative measures were carried out, including his interrogation as suspect. He claims that his request to be provided with a lawyer was rejected on the basis of article 47 (1) of the RSFSR Code of Criminal Procedure, according to which a lawyer should be called to take part in a case at the moment when charges are brought against a person;¹⁰ as a suspect he was not entitled to legal assistance. His complaints on this matter were dismissed by the Prosecutor's Office. He adds that, as a suspect, he familiarized himself with his arrest record only after being de facto detained for some time, a period during which certain investigative measures were carried out. The author claims that, by depriving him of the assistance of a lawyer from the moment of his arrest, the State party violated his rights under article 48 of the Constitution¹¹ and under article 14, paragraph 3 (d), of the Covenant.

8.8 On 6 February 2013, the author added that the Krasnoyarsk Regional Court, on 22 August 1997, deprived him of the right to familiarize himself in court with the proceedings in the case and with the appeals and motions submitted, as well as of the right to present his written objections thereto, as guaranteed by article 328 of the RSFSR Code of Criminal Procedure. These facts restricted his right to defence and also cast doubts on the impartiality of the judge and lay judges.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee takes note of the author's claims under article 14, paragraph 3 (b) and (d) of the Covenant, submitted only in January and February 2013 and not in his initial communication of 22 September 2008: (1) that he was deprived of the right to familiarize himself in court with the proceedings in the case and with the appeals and motions submitted (see para. 8.8 above) and (2) that he was not provided with legal assistance from the moment of his arrest (see para. 8.7 above). The Committee observes, however, that the material before it does not show that the author has raised these claims in the domestic court proceedings prior to invoking them in the present communication. Therefore, it declares this part of the communication inadmissible under articles 2 and 5, paragraph 2

¹⁰ According to article 47(1) of the RSFSR Code of Criminal Procedure, a lawyer should be called to take part in a case at the moment when charges are brought or, if a person suspected of a criminal offence is arrested or detained, before charges are brought against him, at the moment when the arrest record or a detention decision is read out to him.

¹¹ Article 48, paragraph 2, of the Constitution, provides that an arrested or detained person or a person accused of a criminal offence should have a right to legal representation from the moment of his or her arrest, placement into custody or when charges are brought.

(b), of the Optional Protocol, for lack of substantiation and for failure to exhaust domestic remedies.

9.4 As to the author's remaining claims, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol, have been met.

9.5 In the absence of any information or evidence in support of the author's claim that his rights under article 7 of the Covenant have been violated, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee further notes the remainder of the author's allegations under article 14, paragraph 3 (d), of the Covenant, that, in violation of his right to defence, his lawyer was absent during the cassation proceedings and that he was not informed of his right to invite another lawyer to represent him. The Committee notes in this respect the State party's arguments that the author was informed about the possibility to have the assistance of a lawyer but chose not to exercise this right and that the criminal procedure law in force at the material time did not provide for the mandatory participation of a lawyer in cassation proceedings. The Committee observes that, as it transpires from the decision of the Supreme Court of 10 June 1998, the author's cassation appeal was prepared and submitted by the lawyer who had represented him during the first instance court proceedings and that the court addressed the arguments put forward in the appeal. In the circumstances, and in the absence of any explanation from the author of how his right to defence had been affected, the Committee concludes that the author has failed to substantiate, for purposes of admissibility, his claims under article 14, paragraph 3 (d), of the Covenant, and declares them inadmissible under article 2 of the Optional Protocol.

9.7 As regards the author's claims under article 14, paragraph 3 (g), of the Covenant, that he made self-incriminating statements because he had not been explained the meaning of article 51 of the Constitution (right to remain silent) and that the text of the article was printed in the procedural documents only after he had been acquainted with the content of the criminal case file, the Committee notes the State party's argument, not refuted by the author, that the author certified with his signature that he had been explained his rights, including the rights set out in article 51 of the Constitution, and that the forensic-technical examination of the procedural documents in question concluded that his allegations were groundless. Accordingly, and in the absence of any other pertinent information on file, the Committee concludes that the author has failed to substantiate, for purposes of admissibility, his claims under article 14, paragraph 3 (g), of the Covenant, and declares them inadmissible under article 2 of the Optional Protocol.

9.8 The Committee considers that the author's remaining allegations raising issues under articles 6; 14, paragraph 1; 15, paragraph 1; and 26, of the Covenant, have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's allegations under article 14, paragraph 1, of the Covenant, that his case was not considered by a competent, independent and impartial tribunal established by law since it should have been considered by a jury, and that domestic courts failed to bring his sentence into compliance with the Constitutional Court's decision No. 3-P of 2 February 1999. The Committee further notes that the author also claims a violation of his rights under article 26 of the Covenant, a claim which appears to

be based on the same fact, i.e., that he was denied a trial by a jury while jury trials were granted to some other accused persons in courts in other regions of the Russian Federation (see paras. 2.2 and 3.2 above).

10.3 The Committee takes note of the State party's arguments that the author's sentence was handed down on 22 August 1997 by a court composed of one professional judge and two lay judges and that this was due to the fact that, at that time, trials by jury had not yet been introduced in the Krasnoyarsk region. It also notes the State party's explanation that the author's case was considered by a competent, independent and impartial tribunal established by law since according to section 2 "Final and Transitional Provisions", part 6, of the Constitution the previous procedure of examination of that category of cases by the courts is preserved until the entry into force of the federal law setting out the procedure for the examination of cases by a jury. In the light of this explanation, the Committee considers that the author was tried by the court which was competent at the time of examination of his criminal case.

10.4 As to the author's claim regarding the failure of courts to review his sentence on the basis of the Constitutional Court's resolution No. 3-P, the Committee notes the State party's contention that the author's claim is based on a wrong interpretation of the temporal application of the decision. In this respect, the Committee observes that the Constitutional Court ruled that from the moment of entry into force of its decision (2 February 1999) and until the adoption of a federal law ensuring exercise of the right of all persons accused of crimes punishable by death to be tried by a jury, the imposition of death penalty was no longer permissible. The Committee takes note of the argument of the State party that the decision does not have retroactive effect and death sentences handed down prior to its entry into force (i.e., prior to 2 February 1999) were not subject to review on the basis of the decision. The Committee observes that the author was sentenced to death on 22 August 1997, before the entry into force of the said decision, therefore the decision cannot serve as a legal basis for the review of his sentence. In the light of the considerations in paragraphs 10.3 and 10.4, the Committee finds that the materials on file do not permit it to conclude that the author's rights under article 14, paragraph 1, of the Covenant, have been violated in the present case.

10.5 With regard to the author's allegations under article 6 of the Covenant, the Committee observes that on 3 June 1999 the author was pardoned by presidential decree and his death sentence imposed on 22 August 1997 was commuted to life imprisonment. In the circumstances, the Committee will not examine separately the author's claims under article 6 of the Covenant.¹²

10.6 In respect of the author's claim under article 26 of the Covenant, the Committee takes note of the State party's explanation that the examination of criminal cases concerning offences for which a death sentence could have been imposed by a court with the participation of a jury was introduced initially only in nine regions of the Russian Federation (decision of the Supreme Council of the Russian Federation of 16 July 1993) and Krasnoyarsk region was not one of them (see para. 6.1 above). It also notes the State party's argument that section 2 "Final and Transitional Provisions", part 6, of the Constitution established that, until the adoption of the federal law setting out the procedure for the examination of cases by a jury, the existing procedure of examination of that category of cases by courts should be preserved. The Committee recalls its jurisprudence¹³

¹² See communications No. 1284/2004, *Kodirov v. Uzbekistan*, Views adopted on 20 October 2009, para. 9.4; No. 1378/2005, *Kasimov v. Uzbekistan*, Views adopted on 30 July 2009, para. 9.7.

¹³ See communication No. 790/1997, *Cheban et al. v. Russian Federation*, Views adopted on 24 July 2001, para. 7.2.

to the effect that, while the Covenant contains no provision establishing a right to a jury trial in criminal cases, if such a right is provided under domestic law, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds. The Committee notes that the availability of a jury trial is governed by federal law, but that there was no federal law on the subject. The Committee considers that the fact that a federal State permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26 of the Covenant.¹⁴ Since the author has not provided any information to the effect that jury trials have been held in capital cases in Krasnoyarsk region so as to substantiate a difference in treatment between him and other accused, the Committee cannot conclude to a violation of his rights under article 26 of the Covenant.

10.7 The Committee notes the author's claims that the commutation of his death sentence to life imprisonment constitutes a violation of his rights under article 15, paragraph 1, of the Covenant. It notes in this respect the author's arguments that (a) the decision No. 3-P of the Constitutional Court of 2 February 1999 outlawed the death penalty and therefore the sanction for the crime he committed became lighter (maximum 15 years' imprisonment); (b) life imprisonment is a form of punishment imposed only for the commission of particularly grave crimes while the crime he committed belonged to the category of grave crimes; and (c) as a consequence of the presidential pardon, a heavier penalty was imposed on him than the one that was applicable at the time of commission of the crime.

10.8 The Committee takes note of the State party's explanation that the author's argument that the sanction for the crime he committed became lighter is based on a wrong interpretation of the decision No. 3-P of the Constitutional Court, which did not address the matter of constitutionality of the death penalty as category of punishment or outlawed the death penalty, as alleged by the author. Furthermore, the presidential decree pardoning the author was adopted pursuant to article 59, part 3, of the Criminal Code, according to which the death sentence as a result of pardon may be commuted to either life imprisonment or 25 years' imprisonment; pardon as an act of mercy cannot lead to consequences that are heavier for the convict than those that were established for under criminal law.

10.9 The Committee observes that article 15, paragraph 1, regards the nature and the purpose of the penalty, its characterization under national law and the procedures regarding the determination and the enforcement of the penalty as part of the criminal proceedings. The Committee notes that pardon is in essence humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.¹⁵ It also notes that, in any event, life imprisonment cannot be seen as constituting a heavier penalty than the death penalty. The Committee therefore concludes that there has been no violation of article 15, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

¹⁴ See communication No. 1425/2005, *Marz v. Russian Federation*, Views adopted on 21 October 2009, para. 6.3.

¹⁵ *Ibid.*, para. 6.6.

**Z. Communication No. 1863/2009, *Maharjan v. Nepal*
(Views adopted on 19 July 2012, 105th session)***

<i>Submitted by:</i>	Dev Bahadur Maharjan (represented by counsel, Mandira Sharma, Advocacy Forum – Nepal)
<i>Alleged victims:</i>	The author, his wife and parents
<i>State party:</i>	Nepal
<i>Date of communication:</i>	31 December 2008 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest and incommunicado detention, and acts of torture against a former teacher, on suspicion of membership in the Communist Party (Maoist)
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary arrest and detention; Torture and ill-treatment; incommunicado detention; enforced disappearance; conditions of detention; right to an effective remedy
<i>Articles of the Covenant:</i>	2, para. 3, alone and in conjunction with 7, 9, 10
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 2012,

Having concluded its consideration of communication No. 1863/2009, submitted to the Human Rights Committee by Dev Bahadur Maharjan under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 31 December 2008, is Dev Bahadur Maharjan, a national of Nepal, born on 22 March 1972. He alleges violations by Nepal of his rights under article 2, paragraph 3, read alone and in conjunction with articles 7, 9 and 10 of the Covenant. He also claims that the State party violated his family's rights under

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

article 7 of the Covenant. The State party acceded to the Covenant and its Optional Protocol on 14 May 1991. The author is represented by counsel, Mandira Sharma (Advocacy Forum – Nepal).

The facts as presented by the author

2.1 On 15 November 2003, while the author, his wife and his parents were sleeping, soldiers of the Royal Nepalese Army (RNA) broke their door to gain entry into his house in Kathmandu. They questioned the author about his brother who was associated with the Communist party (Maoists). The soldiers searched the house and requested the author to sign a document confirming that they did not harm him, his family or property. The author was also requested to call one of the army officers within a week to reveal his brother's whereabouts, which the author did, without however having any information on his brother's location. After four or five days, the Armed Police Force¹ carried out a search at the author's house and questioned him about his brother. Around four or five days after that, plain clothes men with revolvers searched his house. The author was not presented with a warrant for any of the searches.

2.2 On 26 November 2003, the author was arrested at his home by members of RNA, some of them in plain clothes and some of them in uniform. He was asked to take them to his sister's house, where they suspected that his younger brother would be. He was then detained at the Chhauni military barracks in Kathmandu, where he was kept in the same room as his brother-in-law, R.M., who had also just been arrested. He was not presented with an arrest warrant, nor given any reason for his arrest. Eight months after his arrest, on 29 July 2004, he was given a preventive detention order for 90 days under the Terrorist and Disruptive Activities (Control and Punishment) Act.² This order expired on 26 October 2004. On 1 November 2004, the Chief District Officer of Kathmandu District signed a preventive detention order authorizing the author's detention under the Public Security Act.³

2.3 He was detained at the Chhauhni military barracks from 26 November 2003 to 17 September 2004, when he was transferred to an official detention facility, Sundarijal detention centre. For the majority of the 10 months that the author was held at the Chhauni Barracks, he was kept in overcrowded rooms infested with lice, he had to sleep on a blanket on the floor, he had limited access to sanitary facilities and he was allowed to wash only three times during his entire detention there. For his entire detention at the military barracks, the author was blindfolded or made to wear a hood which allowed him to look downwards only. Moreover, he was not able to contact his family and friends, or consult with a lawyer during this time. During visits by delegates of the International Committee of the Red Cross (ICRC), the author was hidden in a different room and was therefore not able to speak to them. However, on 17 August 2004, together with other detainees, the author wrote a letter to ICRC alerting them of the torture and conditions of detention. In addition, his detention at the military barracks was not officially acknowledged by the State party.

¹ According to the author, the Armed Police Force is a paramilitary force founded in 2001.

² According to section 9 of the Terrorist and Disruptive Activities (Control and Punishment) Act, an individual can be preventively detained for up to a full year in cases where there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist or destructive act.

³ Section 3 (1) of the Public Security Act 1989 states that in cases where there exist adequate and appropriate grounds to prevent any person from doing anything which may immediately undermine the sovereignty, integrity or public tranquillity and order of the Kingdom of Nepal, the local authority may issue an order to detain such person in any specified place for a specified period.

2.4 While he was detained in the military barracks, he was subjected to torture and ill-treatment. Sixteen days after the author's arrest, he was questioned for four consecutive nights about Maoist activity and a list of people, some of whom he knew. When the author answered that he was not a Maoist, he was beaten on his back, his legs, the soles of his feet, and shins, kicked in his chest and face, he was partially asphyxiated and cold water was spilled over him. On the last day of his questioning, the author was requested to direct the soldiers to the house of M.M., a social worker whom the author had met through his work as a teacher. The author directed them to the house. On their way back to the military barracks, the soldiers killed a random person who was standing at the perimeter fence of the barracks. They threatened the author not to tell anybody about this shooting or they would kill him. After this event, the author feared even more for his life. On the fourth day of his questioning, the author was in severe pain; he had fever and could not move his body on his own. His brother-in-law, who was detained in the same room, witnessed the author's injuries and stated that, during four consecutive nights, he heard the author scream in the neighbouring room. During his whole detention at the military barracks, the author did not receive any medical treatment.

2.5 After the author's disappearance, his family and friends tried to search for him. They visited the Chhauni barracks, as well as other army barracks and police stations. They visited Government offices, including the Army Headquarters and District Administration Offices. They also approached ICRC, local human rights organizations, the Human Rights Committee of the Nepal Bar Association and the National Human Rights Commission (NHRC). The author's father staged a sit-in to try to put pressure on the Government to release the author or at least reveal his whereabouts to the family. Despite repeated efforts, no official confirmation of the author's detention and whereabouts could be obtained. It was only upon his transfer to the Sundarijal detention centre on 17 September 2004 when his detention was acknowledged and he was able to receive visitors.

2.6 The author was released from detention on 7 January 2005, after his sister filed a successful writ of habeas corpus with the Supreme Court. The Supreme Court held that the author had been detained without sufficient ground and reason and without complying with appropriate legal procedure. He was never charged with any offence. Despite the passage of almost three years since his release, there has been no investigation by the State party into his enforced disappearance and torture and he has not been given any compensation.

2.7 On the day of the author's release, attempts were made by the security forces to re-arrest him and the author had to switch vehicles on two occasions. The car in which the author was originally travelling was pulled over and the occupants were interrogated by the police.⁴ The author went into hiding for about two weeks after his release fearing for his life and freedom. Approximately three to four weeks after his release, the author went to the Centre for Victims of Torture (CVICT); however, when they referred him to the hospital, he noticed that their vehicle was being followed by army personnel. Due to fear of re-arrest or reprisals by the army, the author did not go to the hospital and did not return to CVICT. For about seven months after the author's release, he had difficulties walking any substantial distance, had trouble eating, suffered from fever and continues suffering from respiratory problems, in particular during winter. He also has long and short-term memory problems and, as a consequence, had to quit his teaching job. According to a medical certificate of 23 May 2008, the author suffers from depression and post-traumatic stress disorder. He did not suffer of any of those conditions before his detention.

⁴ See International Commission of Jurists, "Attacks on Justice – Nepal" (11 July 2005), stating that the remedy of habeas corpus was not effective to combat arbitrary detention, because — among other reasons — police and military authorities simply re-arrested detainees immediately following their release from custody.

2.8 The author's enforced disappearance placed substantial financial and psychological stress on his family. The author was the only breadwinner of the family. The author's wife and father experienced health problems due to their constant worry and the author's wife, who was eight months pregnant when the author was arrested, had complications during the birth of their daughter.

2.9 With regard to the exhaustion of domestic remedies, the author cites the Committee's jurisprudence, according to which the exhaustion of domestic remedies rule does not require resort to actions that objectively have no prospect of success,⁵ nor does it require that victims pursue remedies that are either inapplicable de jure or de facto and do not constitute an effective remedy within the meaning of article 2, paragraph 3 of the Covenant,⁶ and claims this should apply to his case. He maintains that the domestic remedies are ineffective and insufficient and that the level of fear the author felt at the time of his release prevented him from exhausting them. First of all, the author explains that the crimes of torture,⁷ ill-treatment, enforced disappearance and incommunicado detention are not criminalized in domestic criminal law. Torture, inhuman treatment and enforced disappearance are addressed in the Constitution; however, there is no implementing legislation criminalizing them. Therefore, the author cannot make a complaint to the police, nor the police investigate ex officio, as the crimes are not contained in legislation. The author could have filed a complaint to the police or to the District Court for private prosecution of a lesser crime, such as assault or inhuman detention; however, the author claims that filing such complaints would have not provided him with any redress, as they fail to take into account the gravity of the harm suffered and they are unlikely to result in an independent investigation, as the police was placed under the RNA command structure in November 2003. Moreover, the author argues that the Army Act of 1959 and the new Army Act of 2006 grant immunity for army personnel for any actions taken in good faith "while discharging their duties", including torture and enforced disappearances. The same applies for actions under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004, under which the author was detained from 29 July to 26 October 2004.

2.10 The author further claims that the habeas corpus writ to the Supreme Court only became available once the authorities officially recognized his detention, as it was common practice by the Supreme Court to dismiss the complaint if the authorities denied the arrest. In addition thereto, during his detention at the military barracks, the author was not able to take any steps to challenge his detention, as he was prevented from coming into contact with any organization that could help him and not brought before a judge or allowed to see a doctor.

2.11 On 27 November 2003, the author's brother submitted an application to a local non-governmental organization, the Human Rights Organization of Nepal, who wrote on 1 December 2003 to the National Human Rights Commission (NHRC).⁸ However, the author is not aware of any actions that NHRC took as a result of this. On 7 March 2008, the author decided to contact NHRC again requesting compensation. However, in November 2008, he

⁵ See communication No. 210/1986, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

⁶ See communication No. 84/1981, *Dermi Barbatto v. Uruguay*, Views adopted on 21 October 1982, para. 9.4.

⁷ See report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Nepal, E/CN.4/2006/6/Add.5, para. 14.

⁸ The National Human Rights Commission is Nepal's national human rights institution, accredited with A Status, complying with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) of the International Coordinating Committee on National Human Rights Institutions.

was unofficially informed that no steps had been taken to investigate his complaint. The author explains that even if NHRC had investigated his complaint, the remedy would not bring effective relief, as NHRC can only make recommendations to the authorities and cannot enforce its decisions.⁹

2.12 The author adds that the Public Security Act under which he was detained from 1 November 2004 to 7 January 2005 contains a remedy that is inadequate, as it only provides for departmental action or compensation as redress if the detention was an act of bad faith. In addition thereto, it is subject to a short statutory limitation of 35 days. The author claims that the same is true for the Terrorist and Disruptive Activities (Control and Punishment) Act. Both acts allow for preventive detention up to a year and the author would have only been able to petition for compensation and not for release and only, moreover, if he could establish that the authorities acted in bad faith.

2.13 The author claims that the Compensation relating to Torture Act does not provide for criminal accountability but only compensation of a maximum of approximately US\$ 1,266 (100,000 Nepali rupees). A claim must be filed within 35 days of the torture or release from detention and the applicant may be fined if it is decided that the claim was ill-intended or groundless. The author claims that due to his justified fears of reprisals and re-arrest and to the insufficient nature of the remedy itself, he should not be required to exhaust it.

The complaint

3.1 The author claims to be a victim of an enforced disappearance¹⁰ and recalls that the key element defining such disappearance is the act of placing the detainee outside of the protection of the law.¹¹ He claims to be a victim of a violation of article 7 in conjunction with article 2, paragraph 1,¹² by being detained unacknowledged and incommunicado at the Chhauni military barracks from 26 November 2003 to 17 September 2004.¹³ The author notes that he was actively prevented from coming into contact with outside organizations, as he was being hidden from ICRC delegates visiting the barracks and his detention was not officially acknowledged until his transfer to the Sundarijal detention centre.

3.2 He also submits that, during four consecutive nights, the RNA soldiers subjected him to both physical and mental torture to obtain information on Maoist activities, as a result of which he fell unconscious on one occasion, suffered from a severe fever, was in pain and unable to walk for a period of time and continues to experience difficulties walking long distances. In addition to that, during his detention at the military barracks, the

⁹ See Jyoti Sanghera, Deputy Representative of the Office of the United Nations High Commissioner for Human Rights in Nepal, welcome remarks at the International Day in Support of the Victims of Torture, 3 July 2008.

¹⁰ See article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

¹¹ Working Group on Enforced or Involuntary Disappearances, general comment on the definition of enforced disappearance.

¹² See communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5.

¹³ See communications No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.2; No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 13; No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4; No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4; No. 428/1990, *Bozize v. Central African Republic*, Views adopted on 7 April 1994, para. 5.2; No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; No. 540/1993 paras. 8.3–8.5; No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996, para. 5.5.

author was randomly hit and kicked, threatened with death, subjected to verbal abuse and in constant fear of being killed. The author claims that this constitutes torture or at least cruel, inhuman or degrading treatment contrary to article 7. He further claims that the denial of medical treatment during his detention constitutes a breach of articles 7 and 10, paragraph 1.¹⁴

3.3 The author claims that being kept in an overcrowded room infested by lice, blindfolded/hooded during the entire detention, being given inadequate food during the first two months of his detention and being allowed to wash only three times during his entire detention at the military barracks amounts to ill-treatment in contravention of articles 7¹⁵ and 10.¹⁶ He further refers to the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of their liberty¹⁷ and claims that his detention conditions were debasing and humiliating and failed to abide by the Standard Minimum Rules for the Treatment of Prisoners. He claims that the State party therefore breached article 10.

3.4 The author further claims that the State party failed in its duty to investigate the author's allegations and prosecute those responsible, despite having been informed of them on various occasions.¹⁸ He claims that the State party thus violated its duty under article 7 read in conjunction with article 2, paragraph 3.

3.5 The author also claims that by subjecting his family to mental distress and anguish caused by the uncertainty concerning his fate and whereabouts violated article 7 in their respect.¹⁹

3.6 The author submits that the State party breached article 9, paragraph 1, because he was detained from 26 November 2003 to 29 July 2004 and from 26 October 2004 to 1 November 2004 without any authorization,²⁰ contrary to the procedures established under domestic law.²¹ The author further submits that, in failing to inform him of the legal grounds of his arrest or of any charge against him until he was given a detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act on 29 July 2004, the State party breached article 9, paragraph 2. The author submits that the State party's failure to promptly bring him before an independent judicial authority and thus preventing him from challenging his detention²² breached article 9, paragraphs 3 and 4. The author claims that in keeping him in unacknowledged and incommunicado detention and in failing to provide him with an effective remedy, including compensation violated his rights under article 9, paragraph 5 read in conjunction with article 2, paragraph 3.

¹⁴ See general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

¹⁵ See communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, para. 9.2.

¹⁶ See communication No. 458/1991, para. 9.3.

¹⁷ See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3.

¹⁸ See general comment No. 20, para. 14.

¹⁹ See communications No. 107/1981, para. 14; No. 1469/2006, para. 7.9; No. 950/2000, para. 9.5.

²⁰ The author was detained under the Terrorist and Disruptive Activities (Control and Punishment) Act from 29 July 2004 to 26 October 2004 (90 days) and under the Public Security Act from 1 November 2004 until his release on 7 January 2005.

²¹ See communication No. 950/2000, para. 9.4.

²² See general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4.

3.7 Finally, the author claims that article 2, paragraph 3, has been violated in itself,²³ as there is no law criminalizing enforced disappearances, ill-treatment or torture, the State party was unwilling or unable to investigate the author's allegations and there were no proper and accurate records of detainees, which diminished the possibility of filing a habeas corpus petition.

The State party's observations on the admissibility and the merits

4.1 On 27 April 2010, the State party submits that the author was arrested on 29 July 2004 and was handed over to the Sundarijal detention centre on 17 September 2004. It argues that there was no evidence that the author had been tortured and the letter of handover submitted to the detention centre did not contain any remarks about the alleged torture. It notes that the then prevailing 1990 Constitution and the currently prevailing Torture Compensation Act provided for a constitutional remedy and compensation in cases of torture. The State party assures the Committee that the authorities would respect and cooperate with the proper domestic legal procedure, if such a case were lodged. It notes that if the court decided that torture had been inflicted, it could award compensation to the victim and make a recommendation about the necessary actions against the perpetrators. The State party notes that the author has failed to exhaust domestic remedies, as the Army has not received any communication from any competent office or court of law.

4.2 On 16 July 2010, the State party submits additional observations and reiterates that the author was arrested on 29 July 2004 and detained for the purpose of interrogation on the ground that some of his activities were considered a threat to public peace and security. On 17 September 2004, upon the order of the District Administration Office, he was transferred to the detention centre at Sundarijal where he was preventively detained. On 5 January 2005, as per verdict of the Supreme Court, the author was released.

4.3 The State party submits that the author's allegation of torture is groundless, as there was no record about it in the relevant documents. The State party also maintains that any relative or legal counsel may appeal to the district court to request the examination of the physical and mental condition of the supposed victim of torture within three days. However, in relation to the author, the State party did not find any record of such an appeal. It also notes that the author's sister's writ of habeas corpus did not contain any mention of torture. It submits that the author or his relatives did not file any complaint for compensation. The State party therefore maintains that the author's claim is not based on truth. It argues that the author was immediately released upon order by the Supreme Court and has found to be living a free life afterwards and has not sought any kind of redress for the alleged mistreatment or torture.

4.4 The State party reiterates that both the then prevailing 1990 Constitution and the Compensation relating to Torture Act 1996 offer a legal remedy in cases of torture. Article 14, sub-article 4, of the Constitution 1990 stipulated that "no person who is detained during investigation, for trial or for any other reason shall be subjected to physical or mental torture, nor shall be subjected to any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law". Pursuant to the Compensation relating to Torture Act, an individual who has been tortured during detention can file a complaint to the district court claiming compensation within 35 days of being

²³ See communications No. 1469/2006, para. 9; No. 992/2001, *Saker v. Algeria*, Views adopted on 30 March 2006, para. 9.12; No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para. 8; general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 15.

tortured or of release. If the victim is dead or unable to file a complaint on his own, a member of his family or legal counsel can file such a complaint on his behalf. If the court finds that the allegation is true, it may award compensation up to 100,000 Nepalese rupees and may order departmental action against the Government employee responsible for such act. The State party notes that it has been established both nationally and internationally that the State party's judiciary have fulfilled its responsibility in a free and impartial manner even during the difficult days of armed conflict and political adversity. The present communication attests that the author has been released after the order of the competent court. The author however has not made any effort to seek legal remedy before the courts; the State party therefore holds that his allegation of torture cannot be established and should therefore be dismissed.

4.5 The State party submits that the author was not arrested because he was a teacher but because of then prohibited activities he was involved in. The State party notes that the security services have separate human rights units and that training has been regularly carried out, including by the Office of the United Nations High Commissioner for Human Rights in Nepal. It notes that the security institutions are bearing the extra pressure of ensuring peace and security to the general public and that it is counterproductive to impeach the security agencies for unfounded allegations of human rights violations. It notes its full commitment to human rights and assures that all people in the country are provided with equal protection of the law and the opportunity to redress through judicial and administrative procedures established by law. It further reiterates its commitment to constructively engage with the Human Rights Committee. It requests that the present communication be dismissed for the aforementioned ground.

Author's comments on the State party's observations

5.1 On 19 July 2010, the author submits his comments on the State party's observations of 27 April 2009 and notes that, contrary to the State party's observations, he was already arrested on 26 November 2003. The date of the 29 July 2004 is not the date of his arrest but the date on which he was given a detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act.

5.2 With regard to the exhaustion of domestic remedies, the author recalls the Committee's jurisprudence,²⁴ according to which the domestic remedies must be capable of remedying the alleged violations, that they must be available and effective both in law and practice and have objectively prospect of success. They also must not be too dangerous for the complainant.²⁵

5.3 The author reiterates that the writ of habeas corpus remedy was not available to him or his family while he was detained incommunicado at the Chhauni barracks, as he was prevented from any contact with the outside world and as at the time, the Supreme Court had a practice to reject writs of habeas corpus in which the place of detention was not mentioned. Once the author's detention was officially recognized, his sister filed a writ of habeas corpus; however, not knowing about the author's torture and ill-treatment, she did not mention it in her petition. At the court hearing, the marks of torture were hidden under the author's clothes, the judge did not ask the author about the treatment at the place of

²⁴ See communication No. 594/1992, *Phillip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 6.4; communication No. 210/1986, para. 12.3.

²⁵ See communication No. 594/1992, para. 6.4; see also African Commission on Human and Peoples' Rights, *Alhassan Abubakar v. Ghana*, communication No. 103/93, para. 6; African Commission on Human and Peoples' Rights, *Sir Dawda K. Jawara v. The Gambia*, communications No. 147/95 and 149/96, para. 35.

detention and the author was too scared to volunteer this information, in particular as he did not have any medical evidence. In addition to that, on release, attempts were made to re-arrest the author as he was leaving the court. He notes that this was common practice at the time.²⁶ In addition to that, the author notes that, three or four weeks after his release, he consulted the Centre for Victims of Torture, Nepal (CVICT) and, upon their referral to a hospital, was followed by army personnel and was therefore not able to reach the hospital. Due to these threats and his fear of reprisals and re-arrest, the author did not make a complaint to the police, the army or under the Compensation relating to Torture Act.

5.4 The author reiterates that a complaint was registered on his behalf with NHRC on 3 December 2003 (see para. 2.11). On 8 July 2010, the author received a letter confirming that a complaint had been registered. It mentioned that the author had been disappeared by the security forces during the time of the armed conflict on 1 December 2003.²⁷ The author maintains that an application to NHRC is not an effective remedy, as NHRC, a non-judicial body,²⁸ can only issue recommendations. Nevertheless, NHRC was the only body to which the author could turn without fear of reprisals. NHRC took his statement while he was in detention at the Sundarijal detention centre and advised him not to file a claim under the Compensation relating to Torture Act. The author also notes that the State party has not investigated his allegations after the present communication was transmitted to it and that this fact therefore constitutes a separate violation of article 7.²⁹

5.5 The author further reiterates that beyond his legitimate fear for his own safety, the remedies under the Constitution and the Compensation relating to Torture Act do not present available and effective remedies for the purposes of the exhaustion rule. The 1990 Constitution did not define torture as a crime. The 2007 Interim Constitution established torture and enforced disappearance as a criminal offence; however, no bill providing the criminal penalties has been passed by the legislature. Incommunicado detention is not mentioned in either constitutions and is not criminalized. In addition, the author maintains that a complaint under the Compensation relating to Torture Act is not an effective remedy, as the Act does not provide criminal accountability for those responsible,³⁰ and due to the author's fears of reprisal and his physical and mental state after his release, he would not have been able to submit a complaint within 35 days as provided for by the Act. The author further argues that the statutory limitation is not in compliance with article 7.³¹ Moreover, due to the absence of any medical exam during his detention and fear of re-arrest and reprisals upon release, the author was also unable to obtain medical evidence to substantiate a claim under the Compensation relating to Torture Act. In addition to that, the author argues that he was not able to file a criminal complaint under domestic legislation, as the alleged crimes were not illegal and an investigation into the crimes would have been carried

²⁶ See Committee against Torture, conclusions and recommendations of the Committee against Torture: Nepal, CAT/C/NPL/CO/2, para. 28; Amnesty International urgent actions No. 83/05, 12 April 2005; No. 275/04, 18 October 2004; No. 12/06, 12 January 2006; No. 358/03, 11 January 2005.

²⁷ The letter by NHRC does not provide any further details on the circumstances or length of his disappearance.

²⁸ See pp. 9–10 of the State party's response in communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011; communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 14 June 1994, para. 5.2.

²⁹ See general comment No. 31, para. 15.

³⁰ Section 7 of the Compensation relating to Torture Act provides that if it is held that torture has been committed in accordance with this Act, the district court shall order the concerned authority to take a departmental action according to existing law against the government employee who committed the act of torture.

³¹ See article 29 of the Rome Statute of the International Criminal Court; also see general comment No. 31, para. 18.

out by the army itself or the police under unified command of the army and would therefore not have been independent.

5.6 With regard to the evidence, the author submits that he has provided credible and detailed evidence to support his allegations, such as a detailed personal testimony, a testimony by a fellow detainee, his brother-in-law detained at the same time, his wife and sister describing his physical injuries and change in personality, a letter from a local non-governmental organization to NHRC, a letter from a group of detainees, including the author, to ICRC, as well as medical and psychological reports. The author notes that the State party did not provide any evidence to refute his claims. Furthermore, the letter of transferral to the Sundarijal detention centre, to which the State party refers, has not been shown to the author and was not annexed to the State party's observations to the Committee. Additionally, regardless of the content of that letter, the author maintains that he has never received any medical treatment during his detention and that prior to his detention, the author was in good health and the State party has not provided any explanation to show that his injuries did not result from torture or other ill-treatment while in detention.

Additional comments from the author

6.1 On 28 September 2010, the author submits his comments on the State party's additional observations of 16 July 2010 and reiterates his comments of 19 July 2010. The author reiterates that he was not arrested on 29 July 2004, but on 26 November 2003 and that he was released on 7 January 2005 and not on 5 January 2005,³² as indicated in the State party's observations. With regard to the reasons of detention stated by the State party, the author notes that he was not given any reasons on arrest and that the State party has never presented any evidence of his wrongdoing.

6.2 The author notes that he has never been taken before a judge and was not charged with any offence. He submits that under article 3 (3) of the Compensation relating to Torture Act, the detaining authorities have a duty to provide copies of medical reports to the district court and the fact that the State party is not invoking such reports confirms that no medical examinations have been carried out.

6.3 With regard to the State party's observations that "at the time when there is a need of enhancing morale of security institutions and making them more effective, it is counterproductive to impeach security agencies for unfounded allegations", the author contends that in instances in which an arguable case of arbitrary arrest, torture and other ill-treatment is made, the State party is under a duty to conduct a full, thorough and effective investigation into the allegations and is obliged to provide the victim with an effective remedy and adequate reparation. He notes that policy arguments or the profile of those responsible do not alter the State party's obligations.³³

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

³² A letter from the Supreme Court to the Sundarijal detention centre requesting the author's release is stamped on 6 January 2005.

³³ See general comment No. 31, paras. 4, 14 and 18.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the communication does not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol, because the author has not brought any claim to the domestic courts. It notes that the State party claims that the author could have made an application under the then prevailing 1990 Constitution, under the Compensation relating to Torture Act 1996 and to the district court to request the examination of his physical and mental condition within three days. It also notes the State party's argument that the habeas corpus writ did not contain any mention of the alleged torture. The Committee also notes the author's argument that domestic remedies are not effective, as: (a) the alleged violations are not criminalized; (b) complaints for lesser crimes would neither be investigated independently, the police having been placed under the Royal Nepalese Army (RNA) command structure, nor would they provide adequate redress; (c) his unacknowledged detention could not be challenged in the Supreme Court and once it was acknowledged, his sister did not know about his torture and ill-treatment; (d) a claim under the Public Security Act and the Terrorist and Disruptive Activities (Control and Punishment) Act, 2004, could not provide for release but only compensation if it was established that the authorities acted in bad faith and was not available due to the short statutory limitation; and (e) a claim under the Compensation relating to Torture Act would not provide for adequate redress and was not available due to the short statutory limitation. The Committee also notes the author's claim that his fear of reprisals and re-arrest prevented him from exhausting any remedies except for a claim lodged with NHRC.

7.4 In this regard, the Committee recalls that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.³⁴ With regard to the author's failure to raise claims of his enforced disappearance, torture, ill-treatment, arbitrary arrest and inhuman conditions of detention, the Committee observes that the State party has merely listed *in abstracto* the existence of remedies regarding the author's allegation of torture under the then prevailing 1990 Constitution, the Compensation relating to Torture Act and an application to the District Court, without however relating them to the circumstances of the author's case and without showing how they might have provided effective redress in the circumstances. The Committee recalls that the effectiveness of a remedy also depends on the nature of the alleged violation.³⁵

7.5 The Committee observes that article 14, paragraph 4, of the Constitution stipulates a general principle prohibiting physical and mental torture, as well as cruel, inhuman or degrading treatment of detainees. However, this general prohibition does not appear to have been translated in the State party's laws through defining the relevant crimes and corresponding penalties. The Committee recalls its general comment No. 20, in which it holds that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.³⁶ In the light of the grave nature of the alleged violations and in the absence of

³⁴ See communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; No. 1469/2006, para. 6.3; No. 1761/2008, para. 6.3.

³⁵ See communication No. 612/1995, para. 5.2; communication No. 322/1988, *Rodríguez v. Uruguay*, Views adopted on 19 July 1994, para. 6.2; communication No. 540/1993, para. 7.2.

³⁶ See general comment No. 20, para. 8.

any information on how an application under the Constitution may have provided effective relief to the author, including a prompt, effective and impartial investigation into his allegations and punishment of those responsible, the Committee considers that this constitutional remedy did not need to be pursued for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

7.6 With regard to the remedy under the Compensation relating to Torture Act 1996, the Committee observes that, according to article 5, paragraph 1, of the Act claims for compensation must be made within 35 days from the event of torture or after a detainee's release. It also notes that according to article 6, paragraph 2, of the Compensation relating to Torture Act, an applicant may be fined if it is proved that he acted in bad faith. It further notes that the Act provides for a maximum compensation of 100,000 Nepalese rupees (art. 6, para. 1, of the Act). Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the authorities against the alleged perpetrators.³⁷ The Committee observes that, for purposes of admissibility, the author's fear of re-arrest or reprisals after his release from detention has been sufficiently substantiated, including by documentary evidence of similar cases. The Committee therefore considers that because of the 35-day statutory limit from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act, which is in itself flagrantly inconsistent with the gravity of the crime,³⁸ this remedy was not available to the author.

7.7 Concerning the State party's argument that the author or someone on his behalf could have filed an application to the district court to request the examination of his physical and mental condition within three days, the Committee observes that the author was detained incommunicado and his family did not have any knowledge of his whereabouts or treatment. It also notes that the State party has not provided any explanation how this remedy would have been available in the author's specific case and how it might have provided effective relief. The Committee therefore considers that, in the circumstances of the present case, this remedy was not available to the author or his family.

7.8 The Committee concludes that, in the circumstances of the case, it cannot be held against the author that he had not raised these allegations before the State party's courts. It also observes that both the author and his family have complained to the State party's authorities about the author's arbitrary arrest and incommunicado detention. Therefore, the Committee accepts the author's argument that, in the circumstances of his case, domestic remedies were neither effective and nor available and considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.³⁹ The Committee sees no further obstacles to the consideration of the communication and therefore proceeds to its examination on the merits of the author's allegations under article 2, paragraph 3, read alone and in conjunction with articles 7, 9, and 10 of the Covenant.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

³⁷ See communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

³⁸ See general comment No. 31, para. 18.

³⁹ See communication No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.4.

8.2 Regarding the author's alleged unacknowledged detention, the Committee recognizes the degree of suffering involved. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment.⁴⁰ It notes that, according to the information available to the Committee, he was detained incommunicado without an arrest warrant on 26 November 2003 and, on 29 July 2004, eight months after his arrest, he was presented with a preventive detention order under the Terrorist and Disruptive Activities (Control and Punishment) Act. It also notes that the State party, without further explanation, states that the author was arrested on 29 July 2004. During his incommunicado detention at the military barracks until his transfer to Sundarijal detention centre on 17 September 2004, he was prevented from any contact with his family or the outside world. He remained in preventive detention until 7 January 2005.

8.3 The Committee notes that the State party has not provided any response to the author's allegations regarding his enforced disappearance, nor has it substantively refuted his allegation that, on four consecutive nights, he was subjected to acts of torture and ill-treatment at the military barracks. The Committee also notes the author's claim that, during his detention at the military barracks, he was kept in overcrowded rooms infested by lice, had to sleep on a blanket on the floor, was blindfolded/hooded during the entire detention, was given inadequate food during the first two months, had limited access to sanitary facilities, was allowed to wash only three times during his entire detention and was randomly hit and kicked, as well as verbally abused and threatened by the guards. The Committee reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.⁴¹ It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any convincing explanation from the State party in this respect, due weight must be given to the author's allegations.

8.4 On the basis of the information at its disposal, the Committee concludes that keeping the author in captivity without allowing any contact with his family and the outside world, subjecting him to acts of torture and ill-treatment on four consecutive nights and his conditions of detention amount to a violation of article 7 of the Covenant with respect to each one of the author's claims.⁴²

8.5 The Committee notes the anguish and distress caused to the author's family by his disappearance, from the time of his arrest until 17 September 2004, when his detention was acknowledged and he was able to receive visitors. It notes that the author was arrested when his wife was eight months pregnant and that he was the sole breadwinner of the

⁴⁰ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

⁴¹ See communication No. 1782/2008, *Aboufaied v. Libya*, Views adopted on 21 March 2012, para. 7.4; communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

⁴² See communications No. 1761/2008, para. 7.6; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; No. 540/1993, para. 8.5; No. 458/1991, para. 9.4; and No. 440/1990, para. 5.4.

family, which placed a considerable financial burden on them. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author's wife and his parents.⁴³

8.6 With regard to the alleged violation of article 9, the Committee notes that, according to the author, on 26 November 2003, he was arrested without a warrant by soldiers of the Royal Nepalese Army and detained at the Chhauni military barracks incommunicado without being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author was never brought before a judge during his detention, and could not challenge the legality of his detention until it was officially acknowledged and his sister filed a writ of habeas corpus in the Supreme Court. The Committee took note of the State party's contention that the author was arrested on 29 July 2004 under the Terrorist and Disruptive Activities (Control and Punishment) Act of 2004, adopted in the context of the state of emergency declared by the State party, and allowing the arrest and detention of suspects for a period of up to one year. However, in the absence of any pertinent explanations from the State party on the author's arrest and detention from 26 November 2003 to 29 July 2004 and from 26 October 2004 to 1 November 2004, charges against him and a determination by a court on the legality of his arrest and detention, the Committee finds a violation of article 9.⁴⁴

8.7 With respect to article 10, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of the author in detention, the Committee gives due weight to the author's allegations that his conditions of detention at the military barracks amount to ill-treatment and concludes that his rights under article 10, paragraph 1, were violated.⁴⁵

8.8 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance which it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights, even during a state of emergency.⁴⁶ The Committee further recalls that the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.⁴⁷ In the present case, the information before the Committee indicates that the author did not have access to an effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with articles 7, 9, and 10, paragraph 1.

8.9 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

⁴³ See communication No 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 107/1981, para. 14; and No. 950/2000, para. 9.5.

⁴⁴ See communications No. 1782/2008, para. 7.6; No. 1761/2008, para. 7.8; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; and No. 1469/2006, para. 7.3.

⁴⁵ See the Committee's general comment No. 21, para. 3; communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; No 1640/2007, para. 7.7; and No. 1422/2005, para. 6.4.

⁴⁶ General comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 14.

⁴⁷ General comment No. 31, para. 15.

facts before it disclose a violation of articles 7; 9 and 10, paragraph 1, read alone and in conjunction with article 2, paragraph 3 of the Covenant as regards the author. The Committee is also of the view that article 7, read in conjunction with article 2, paragraph 3 of the Covenant was breached with regard to the author's wife and his parents.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by (a) ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author; (b) the prosecution and punishment of those responsible; (c) providing the author and his family with adequate compensation for all the violations suffered; and (d) amending its legislation so as to bring it into conformity with the Covenant, including the amendment and extension of the 35-day statutory limitation from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act; the enactment of legislation defining and criminalizing torture; and the repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future.

10. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**AA. Communication No. 1867/2009, *Levinov v. Belarus*
 Communication No. 1936/2010, *Levinov v. Belarus*
 Communication No. 1975/2010, *Levinov v. Belarus*
 Communication No. 1977/2010, *Levinov v. Belarus*
 Communication No. 1978/2010, *Levinov v. Belarus*
 Communication No. 1979/2010, *Levinov v. Belarus*
 Communication No. 1980/2010, *Levinov v. Belarus*
 Communication No. 1981/2010, *Levinov v. Belarus*
 Communication No. 2010/2010, *Levinov v. Belarus*
 (Views adopted on 19 July 2012, 105th session)***

<i>Submitted by:</i>	Pavel Levinov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Dates of communication:</i>	2 June 2008, 17 February 2010, 10 December 2009, 8 January 2010, 18 March 2010, 20 April 2010, 10 June 2010, 18 June 2010, 8 November 2009 (initial submissions)
<i>Subject matter:</i>	Author was prohibited from holding public pickets
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression, freedom of assembly
<i>Articles of the Covenant:</i>	2, paras. 1–2; 5, para. 1; 14, para. 1; 18, 19; 21; 26
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 2012,

Having concluded its consideration of communications Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010, 2010/2010, submitted to the Human Rights Committee by Pavel Levinov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communications and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the nine communications is Pavel Levinov, a national of Belarus, born in 1961. In all the communications, he claims to be a victim of violations by Belarus of his rights under article 2, paragraphs 1 and 2; article 5, paragraph 1; article 14, paragraph 1; article 19 and article 21 of the International Covenant on Civil and Political Rights. In communications 1867/2009, 1975/2010 and 2010/2010, he also claims to be a victim of violations by Belarus of his rights under article 26 of the Covenant, and in communication 1975/2010, he claims to be a victim of violations by Belarus of his rights under article 18 of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented.

1.2 On 19 July 2012, pursuant to rule 94, paragraph 2, of the Committee's rules of procedure, the Committee decided to join the nine communications for decision in view of their substantial factual and legal similarity.

The facts as submitted by the author

2.1 The author submits that he was refused, on nine different occasions, permission to picket by the executive authorities of the town of Vitebsk, Belarus.

Picket 1 – communication No. 1867/2009

2.2 On 19, 21 and 23 November 2007, the author filed applications with the Executive Town Committee of Vitebsk (hereafter "ETC") requesting to picket on 9 December 2007 in three different locations with the goal of strengthening and developing human rights, raising awareness and publicly expressing an interest in human rights issues. In the application he specified that the picket would be conducted only by himself. On 28 and 30 November and on 3 December 2007, the ETC replied that picketing was prohibited in accordance with point 1 of ETC decision No. 820 of 24 October 2003 (Regarding the procedure for organization and conduct of public gatherings in Vitebsk town), which determined that public gatherings can only be organized in a few specified locations in Vitebsk town and the locations suggested by the author were not among them.

2.3 On 5 December 2007, the author filed an appeal against the decisions of the ETC before the Vitebsk Regional Court, which was rejected on 7 December 2007. On 18 December 2007, the author appealed the first instance decision before the District Court of Vitebsk. On 14 January 2008, the District Court issued a ruling confirming the Regional Court's decision and rejecting the author's appeal. The author attempted an appeal through the supervisory review mechanism before the Supreme Court of Belarus, which rejected his appeal on 28 April 2008.

Picket 2 – communication No. 1936/2010

2.4 On 30 January 2009, the author filed an application with the ETC requesting to hold a picket on 14 February 2009 entitled "Vitebsk – the town of love," on the occasion of Saint Valentine's day. In the application he specified that the picket would be conducted by himself only and that the intended location was the pedestrian crossing at Lenin Street and Frunze Boulevard, across from the Liberty Square in Vitebsk. The acting President of the ETC issued a decision prohibiting the picket, which was delivered to the author on 10 February 2009. The picket was allegedly prohibited in accordance with point 1 of ETC decision No. 820 of 24 October 2003, the reason being that the location suggested by the author for his picket was not among the permitted locations. The ETC's decision was issued based on the law regarding public events in the Republic of Belarus. Permission to hold the picket was also allegedly refused because the application for permission was filed only on 2

February 2009,¹ in violation of articles 5 and 9 of the same law, which provide for a 15-day deadline prior to the event for requesting permission to organize public gatherings.

2.5 On 15 February 2009, the author filed an appeal against the decision of the acting President of the ETC before the Vitebsk Regional Court, which was rejected on 11 March 2009. On the same date, the author appealed before the District Court of Vitebsk. On 16 April 2009, the District Court issued a ruling confirming the Regional Court's decision and rejecting the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk District Court (20 April 2009) and to the President of the Supreme Court of Belarus (26 May 2009). Both rejected his appeals (15 May 2009 and 24 July 2009, respectively) and affirmed that the decision of the first instance court was lawful.

Picket 3 – communication No. 1975/2010

2.6 On an unspecified date, the author filed an application with the ETC requesting to hold a picket on 7 January 2009, the purpose being to celebrate Orthodox Christmas. In the application he specified that the picket would be conducted by himself only and that he planned to congratulate his fellow citizens for Orthodox Christmas, standing in a pedestrian area on the Novoroshansk road in Vitebsk. The application was reviewed by the Deputy President of the ETC, who, on 30 December 2008, issued a decision prohibiting the picket. The picket was prohibited in accordance with ETC decision No 820 of 24 October 2003, the reason being that the location suggested by the author for his picket was not among the permitted locations. On 10 January 2009, the author filed an appeal against the decision of the Deputy President of the ETC before the Oktyabrsky District Court, which was rejected on 27 January 2009. On the same date, the author filed a cassation appeal against the District Court's decision before the Regional Court of Vitebsk. On 19 February 2009, the Regional Court issued a ruling confirming the first instance's decision and rejecting the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk Regional Court (4 March 2009) and to the President of the Supreme Court of Belarus (4 April 2009). Both rejected his appeals (31 March 2009 and 18 June 2009, respectively).

Picket 4 – communication No. 1977/2010

2.7 On an unspecified date, the author filed an application with the ETC of Vitebsk requesting to hold a picket on 25 January 2009 devoted to the anniversary of the birth of the poet Vladimir Vysotsky. In the application he specified that the picket would be conducted by himself only and that he intended to stand in front of the V.I. Lenin District Library. The application was reviewed by the Deputy President of the ETC, who, on 19 January 2009 issued a decision prohibiting the picket in accordance with ETC decision No. 820 of 24 October 2003 (Regarding the procedure for organization and conduct of public gatherings in Vitebsk town), the reason being that the location suggested by the author for his picket was not among the permitted locations. The Town Committee's decision was based on the law regarding public events in the Republic of Belarus. On 21 January 2009, the author filed an appeal against the decision of the Deputy President of the ETC before the Oktyabrsky District Court, which was rejected on 16 February 2009. On the same date, the author filed a cassation appeal against the District Court's decision to the Regional Court of Vitebsk. On 30 March 2009, the Regional Court issued a ruling confirming the first instance's decision and rejecting the author's appeal. The author attempted appeals through

¹ The author maintains that he submitted the application on 30 January 2009; the court decision states that the application was received on 2 February 2009.

the supervisory review mechanism to the President of the Vitebsk Regional Court (3 April 2009) and to the President of the Supreme Court of Belarus (21 April 2009). Both rejected his appeals (15 April 2009 and 23 June 2009, respectively).

Picket 5 – communication No. 1978/2010

2.8 On 16 February 2009, the author filed an application with the ETC of Vitebsk requesting to hold a picket on 4 March 2009 with the purpose of drawing citizens' attention to the problem of violations of human rights and freedoms by police officers in the Republic of Belarus. In the application he specified that the picket would be conducted by one person only and that the intended location was the pedestrian crossing at Lenin Street and Frunze Boulevard, across from Liberty Square in Vitebsk. The application was reviewed by the acting President of the ETC of Vitebsk, who, on 24 February 2009 issued a decision prohibiting the picket in accordance with point 1 of ETC decision No. 820 of 24 October 2003, the reason being that the location suggested by the author for his picket was not among the permitted locations. The ETC's decision was based on the law regarding public events in the Republic of Belarus. On 26 February 2009, the author filed an appeal against the decision of the acting President of the ETC before the Vitebsk Regional Court, which was rejected on 1 April 2009. On the same date, the author filed a cassation appeal against the Regional Court decision to the District Court of Vitebsk. On 4 May 2009, the District Court issued a ruling confirming the Regional Court's decision and rejecting the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk District Court (25 May 2009) and to the President of the Supreme Court of Belarus (22 June 2009). Both rejected his appeals (9 June 2009 and 24 July 2009, respectively).

Picket 6 – communication No. 1979/2010

2.9 On 14 May 2009, the author filed an application with the ETC of Vitebsk with a request to hold a picket on 1 June 2009 with the purpose of drawing citizens' attention to the problem of violations of children's rights. In the application he specified that the picket would be conducted by one person only and that the intended location was the pedestrian crossing at Lenin Street and Frunze Boulevard, across from Liberty Square in Vitebsk. The application was reviewed by the Deputy President of the ETC, who, on 14 May 2009 issued a decision prohibiting the picket. The picket was prohibited in accordance with ETC decision No. 820 of 24 October 2003, the reason being that the location suggested by the author for his picket was not among the permitted locations. The Town Committee's decision was based on the law regarding public events in the Republic of Belarus. On 24 June 2009, the author filed an appeal against the decision of the Deputy President of the ETC before the Oktyabrsky District Court, which was rejected on 24 July 2009. On the same date, the author filed a cassation appeal against the District Court's decision to the Regional Court of Vitebsk. On 17 August 2009, the Regional Court issued a ruling confirming the first instance's decision and rejecting the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk Regional Court (16 October 2009) and to the President of the Supreme Court of Belarus (8 November 2009). Both rejected his appeals (4 November 2009 and 10 December 2009, respectively).

Picket 7 – communication No. 1980/2010

2.10 On 9 November 2009, the author filed an application with the Administration of Oktyabrsky District of Vitebsk requesting to hold a picket on 10 December 2009, with the purpose of supporting State institutions in strengthening and developing human rights and popularizing human rights instruments. In the application he specified that the picket would be conducted by one person only and that the intended location was the pedestrian crossing

at Lenin Street and Frunze Boulevard across from Liberty Square in Vitebsk. The application was reviewed by the Head of Administration of Oktyabrsky District, who, on 20 November 2009, issued a decision prohibiting the picket. The picket was prohibited in accordance with ETC decision No. 881 of 10 July 2009 (Regarding public events in Vitebsk town), the reason being that the location suggested by the author for his picket was not among the permitted locations. The decision also stated that the author had failed to present contracts with the Department of Interior of the District Administration to ensure public order during the picket; the Health Department to ensure medical care during the picket; and the Utilities Department to ensure the cleaning of the area where the picket would take place, as required by ETC decision No. 881. On 1 December 2009, the author filed an appeal against the decision of the Head of Administration of Oktyabrsky District before the Oktyabrsky District Court, which was rejected on 24 December 2009. On 3 January 2010, the author filed a cassation appeal against the District Court's decision to the Regional Court of Vitebsk, which was rejected on 8 February 2010. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk Regional Court (19 February 2010) and to the President of the Supreme Court of Belarus (25 March 2010). Both rejected his appeals (18 March 2010 and 5 May 2010, respectively).

Picket 8 – communication No. 1981/2010

2.11 On 30 November 2009, the author filed an application with the ETC of Vitebsk requesting to hold a picket on 31 December 2009 with the purpose of congratulating his fellow citizens on the occasion of Christmas and New Year's Eve. In the application he specified that the picket would be conducted by one person only, dressed as "Father Frost" and that the intended location would be the pedestrian crossing at Lenin Street and Frunze Boulevard, across from Liberty Square in Vitebsk. In violation of local legislation, the application was not reviewed by the President of the ETC of Vitebsk, but by the Head of Administration of Oktyabrsky District, who, on 7 December 2009, issued a decision prohibiting the picket. The picket was prohibited in accordance with ETC decision No. 881 of 10 July 2009, the reason being that the location suggested by the author for the picket was not among the permitted locations. The decision also stated that the author had failed to present contracts with the Department of Interior of the District Administration to ensure the public order during the picket; the Health Department to ensure medical care during the picket; and the Utilities Department to ensure cleaning of the territory where the picket would take place, as required by ETC decision No. 881. On 15 December 2009, the author filed an appeal against the decision of the Deputy President of the ETC before the Oktyabrsky District Court, which was rejected on 5 January 2010. On 25 January 2010, the author filed a cassation appeal against the District Court's decision to the Regional Court of Vitebsk. On 25 February 2010, the Regional Court issued a ruling confirming the first instance's decision and rejecting the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk Regional Court (13 March 2010) and to the President of the Supreme Court of Belarus (6 April 2010). Both rejected his appeals (29 March 2010 and 15 May 2010, respectively).

Picket 9 – communication No. 2010/2010

2.12 On an unspecified date, the author filed an application with the ETC of Vitebsk requesting to hold pickets on 7 and 10 December 2008 devoted to the 60th anniversary of the Universal Declaration of Human Rights and the 10th anniversary of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms with the purpose of supporting State institutions in strengthening and developing human rights and popularizing human rights instruments and public expression of interest in human rights issues. In the application he specified that the pickets would be conducted by one person

only and that he intended to stand at the crossing of Moskovskaya and Viktory boulevards on 7 December 2008 and in Zheleznodorozhnikov Park on 10 December 2008. The application was considered by the Deputy President of the ETC of Vitebsk, who issued a decision prohibiting the 7 December 2008 picket based on ETC decision No. 820 of 24 October 2003, the reasons being that the location suggested by the author for his picket was not among the permitted locations, and the author had not paid the expenses associated with the maintenance of public order during the picket. The ETC also refused the author's application to hold a picket on 10 December 2008 in a location authorized by decision No. 820, namely, Zheleznodorozhnikov recreation park. The reason invoked was that the municipal authorities planned to conduct the picket "Youth for a healthy lifestyle – 2008" in the park. The author submits that the location he had chosen for his picket in the park was 100 metres away from the venue where the "Youth for a healthy lifestyle – 2008" picket was planned to take place.

2.13 On 1 December 2008, the author filed an appeal against the decision of the Deputy President of the ETC before the Oktyabrsky District Court of Vitebsk, which was rejected on 19 December 2008. On 16 January 2009, the author filed a cassation appeal against the District Court's decision to the Regional Court of Vitebsk. On 12 February 2009, the Regional Court upheld the first instance's decision and rejected the author's appeal. The author attempted appeals through the supervisory review mechanism to the President of the Vitebsk Regional Court (26 February 2009) and to the President of the Supreme Court of Belarus (3 April 2009). Both were rejected on 27 April 2009 and 18 June 2009, respectively.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies.

3.2 In all the communications the author claims that Belarus is in violation of its obligation under article 2, paragraph 2, of the Covenant by failing to undertake the necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights to freedom of assembly and association, as private citizens are not allowed to raise such issues before the Constitutional Court. The author makes reference to communication No. 628/1995,² in which the Committee found it incompatible with the Covenant that the State party had given priority to the application of its national law over its obligations under the Covenant, and argues that Belarus has also given precedence to its national legislation in violation of article 2, paragraph 1, of the Covenant.

3.3 In all the communications the author claims that his freedom of expression has been restricted arbitrarily in violation of the Constitution and of article 19 of the Covenant, as the restriction in question was neither justified by reasons of national security or public safety, public order, or protection of public health or morals, and was not necessary for the protection of the rights and freedoms of others.

3.4 In all the communications the author claims that his right to peaceful assembly was restricted in violation of article 21 of the Covenant, as the imposed restrictions contradict the Belarusian Constitution and are not necessary in a democratic society.

3.5 In all the communications the author also alleges that the courts reviewing the decisions of the ETC acted in violation of the international human rights obligations of Belarus and were under the influence of the executive. Therefore, he alleges that his right to a fair hearing by a competent, independent and impartial tribunal (article 14, paragraph 1,

² *Tae Hoon Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.4.

of the Covenant) was violated. To support his argument, he refers to the report of the Special Rapporteur on the independence of judges and lawyers of 8 February 2001,³ and states that its recommendations have not been implemented by the authorities.

3.6 In all the communications the author states that the decisions in question amount to acts aimed at limiting the freedoms of assembly and association to a greater extent than is provided for in the Covenant and thus violate article 5, paragraph 1, of the Covenant.

3.7 In communications Nos. 1867/2009, 1975/2010 and 2010/2010, the author also claims to be a victim of violation by Belarus of his rights under article 26 of the Covenant. He maintains that the decision of town authorities to prohibit the organization of the pickets was politically motivated and represents discrimination towards the realization of citizens' rights to freedom of expression and peaceful assembly, in contradiction of article 26 of the Covenant.

3.8 In communication No. 1975/2010, the author also claims to be a victim of violation by Belarus of his rights under article 18 of the Covenant. He maintains that the domestic legislation does not contain limitations of the right to express one's religious opinion; accordingly, the authorities' refusal to allow him to congratulate his fellow citizens on the occasion of Orthodox Christmas amounts to arbitrary limitation to his freedom to express his religious feeling and a violation of article 18 of the Covenant.

State party's observations on the admissibility of communication 1867/2009

4. On 23 April 2009, the State party submits, with regard to communication 1867/2009, that the author had requested on 19, 21 and 23 November 2007 permission to hold a public picket on 9 December 2007. He was refused such permission and he appealed before the Vitebsk Regional Court, which rejected the appeal on 7 December 2007. It further submits that the author appealed the first instance decision to the District Court of Vitebsk, which, on 14 January 2008, rejected the appeal, and that the author's application for supervisory review to the Supreme Court of Belarus was also rejected by the Deputy President of the Supreme Court. The State party submits that according to article 439 of the Civil Procedure Code, the President of the Supreme Court, the General Prosecutor of the Republic and the Head Prosecutors of Vitebsk District can also submit requests for supervisory reviews and notes that the author did not make use of these avenues for appeal. Accordingly, the State party maintains that the author failed to exhaust available domestic remedies and that there is no ground to believe that the remedies would be unavailable or ineffective. Therefore, the communication is inadmissible.

Author's comments on the State party's observations

5. On 4 June 2009, the author comments on the State party's observations on the admissibility of communication 1867/2009. He maintains that the State party's submission on the inadmissibility of his communication aims to conceal the violations of his rights under articles 14, 19, 21 and 26 of the Covenant. He acknowledges that according to article 439 of the Civil Procedure Code, the President of the Supreme Court, his deputies, the General Prosecutor of the Republic and his deputies, the Head Prosecutors of Minsk and the Districts can also submit requests for supervisory reviews, but maintains that this remedy is not effective, since the decision to put forward a request for supervisory review is purely within the discretion of the above officials. He maintains that practice has demonstrated that in "politically motivated" cases, these officials, who are dependent on the executive, do

³ See E/CN.4/2001/65/Add.1, Civil and political rights, including questions of: independence of the judiciary, administration of justice, impunity, Report of the mission to Belarus.

not put forward requests for supervisory review. In addition, an individual petitioning for supervisory review must pay the lawyer's fees and the court fees, and the author submits that he cannot cover the above costs since he is a pensioner. He further maintains that the domestic legislation does not require individuals petitioning for supervisory review to address each and every of the above officials in order to exhaust domestic remedies. He maintains that he appealed the violation of his rights before the first and second instance court, which rejected his appeals and that he petitioned for a supervisory review on two occasions (to the President of the Supreme Court and to the President of the Vitebsk District Court) and that his petitions were rejected. The author reiterates that he has exhausted all available and effective domestic remedies.

State party's observations on the admissibility and merits of communication No. 1936/2010

6. On 9 July 2010, the State party submits, with regard to communication 1936/2010, that it considers it inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. It submits that according to articles 5 and 9 of the law regarding public events in the Republic of Belarus, an application for the conduct of a public event should be submitted in writing at least 15 days before the date of the planned event. Local executive authorities can determine permanent locations for the conduct of public events, as well as locations where such events are not permitted. The Vitebsk ETC had determined such locations by a decision of 24 October 2003. Since the author's application was submitted in violation of the deadline and he applied to conduct a picket in a location which was not designated for that purpose, his application was refused, as were his cassation appeal and application for a supervisory review to the courts. According to article 439 of the Civil Procedure Code, the General Prosecutor of the Republic, his deputies and the Head Prosecutors of Minsk and the Districts can also submit requests for supervisory reviews; the author did not petition the Prosecutors' offices for a supervisory review. The State party maintains that the author failed to exhaust available domestic remedies and that there is no ground to believe that the above remedies would be unavailable or ineffective. Therefore, the communication is inadmissible. The State party also submits that the author had previously abused his right to submit individual communications and that the foregoing should lead to the non-admissibility of his petitions in accordance with the Optional Protocol. On 27 December 2010, the State party informs the Committee that its 9 July 2010 submission covers both the admissibility and the merits of communication 1936/2010.

Further observations by the State party

7.1 On 6 January 2011, the State party submits, with regard to communications 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, that the author has not exhausted all available domestic remedies in Belarus, including "the appeal to the Prosecutor's office against a judgment having force of *res judicata* as an act of supervision". It further submits that, while being a party to the Optional Protocol, it did not give its consent for the extension of the Committee's mandate; that it considers the above communications as registered with violations of the provisions of the Optional Protocol; that there are no legal grounds for their consideration by the State party; and that "any reference in this connection to the Committee's long-standing practice are unlawfully bound".

7.2 On 5 October 2011, the State party submits, with regard to communications 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010 and 1981/2010, that it believes that there are no legal grounds for the consideration of the author's communications, insofar as they are registered in violation of article 1 of the Optional Protocol. It maintains that the author did not exhaust all available domestic remedies as required by article 2 of

the Optional Protocol since he did not appeal “in Prosecutors’ offices against the decisions taken by the courts”.

7.3 On 25 January 2012, the State party submits, with regard to communications 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, that upon becoming a State party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that recognition of competence is done in conjunction with other provisions of the Optional Protocol, including those that set criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. It maintains that under the Optional Protocol, State parties have no obligation to recognize the Committee’s rules of procedure and its interpretation of the Protocol’s provisions, which “could only be efficient when done in accordance with the Vienna Convention on the Law of Treaties”. It submits that, “in relation to the complaint procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol” and that “references to the Committee’s long-standing practice, methods of work, case law are not subject to the Optional Protocol”. It further submits that “any communication registered in violation of the provisions of the Optional Protocol to the International Covenant on Civil and Political Rights will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without comment on the admissibility or merits”. The State party further maintains that decisions taken by the Committee on such “declined communications” will be considered by its authorities as invalid.

7.4 On 14 February 2012, the State party submits, with regard to communication 2010/2010, that it reiterates its observations submitted on 25 January 2012.

Issues and proceedings before the Committee

The State party’s failure to cooperate

8.1 The Committee notes the State party’s submissions that there are no legal grounds for the consideration of the author’s communications Nos. 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010 insofar as they are registered in violation of article 1 of the Optional Protocol, because the author has failed to exhaust the domestic remedies; that it has no obligations to recognize the Committee’s rules of procedure and its interpretation of the Protocol’s provisions; and that decisions taken by the Committee on the above communications will be considered by its authorities as “invalid”.

8.2 The Committee recalls that article 39, paragraph 2, of the International Covenant on Civil and Political Rights authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and art. 1). Implicit in a State’s adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.⁴ It is up to the Committee to determine whether a case should be registered. The Committee observes that

⁴ See communication No. 869/1999, *Piandiong et al. v. The Philippines*, para. 5.1.

by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of admissibility and of the merits of the communications, the State party has violated its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 Regarding the claims under article 2 of the Covenant, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 3 of the Optional Protocol.

9.4 Regarding the claims under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right. Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.⁵

9.5 With respect to the allegations under article 14, paragraph 1, of the Covenant, the Committee observes that these complaints refer primarily to the appraisal of evidence adduced during the court proceedings and interpretation of laws, matters falling in principle to the national courts, unless the evaluation of evidence was manifestly arbitrary or constituted a denial of justice.⁶ In the present case, the Committee is of the view that the author has failed to demonstrate, for purposes of admissibility, that the conduct of the proceedings in his case was arbitrary or amounted to a denial of justice. The Committee consequently considers that this part of the communication has not been sufficiently substantiated, and thus finds it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee notes that in communication No. 1975/2010 the author claims a violation of his rights under article 18 of the Covenant. The Committee considers that the author has failed to sufficiently substantiate this particular claim for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.7 The Committee notes the author's allegations that his freedom of assembly under article 21 of the Covenant has been restricted arbitrarily on nine occasions, since he was

⁵ See communications No. 1167/2003, *Rayos v. Philippines*, Views adopted on 27 July 2004, para. 6.8, and No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 8.6.

⁶ See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 26; see, inter alia, communications No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 6.3; No. 1084/2002, *Bochaton v. France*, decision of inadmissibility adopted on 1 April 2004, para. 6.4; No. 1167/2003, *Rayos v. Philippines*, Views adopted on 27 July 2004, para. 6.7; and No. 1399/2005, *Cuartero Casado v. Spain*, decision of inadmissibility adopted on 25 July 2005, para. 4.3.

refused permission to hold pickets. The Committee, however, notes that the author, according to his own submissions, intended to conduct the nine pickets on his own. Accordingly, in the circumstances of the present case, the Committee considers that the author has failed to sufficiently substantiate this particular claim, for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.⁷

9.8 In communications 1867/2009, 1975/2010 and 2010/2010, the author also claims that the refusal of the State party's authorities to allow his pickets was discriminatory and violated his rights under article 26 of the Covenant. However, the Committee considers that this part of the communication has not been sufficiently substantiated, and thus finds it inadmissible under article 2 of the Optional Protocol.

9.9 The Committee takes note of the State party's challenge of the admissibility of the communications on the grounds of non-exhaustion of domestic remedies, namely the author's failure to petition the President of the Supreme Court or the General Prosecutor's Office or Heads of District Prosecutor's Office for supervisory reviews of the courts' decisions prohibiting his pickets. The Committee recalls its previous jurisprudence,⁸ according to which supervisory review procedures against court decisions which have entered into force constitute an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. In such circumstances, and also noting that on several instances, the author had appealed for supervisory reviews to the Supreme Court, which had rejected his appeals, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

9.10 Regarding the author's claims of violation of his rights under article 19 of the Covenant, the Committee finds them sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's allegations that his freedom of expression has been restricted arbitrarily on nine occasions, since he was refused permission to hold public pickets and to publicly express his opinion on a variety of issues. The Committee considers that the legal issue before it is to decide whether the prohibitions to hold public pickets imposed on the author by the executive authorities of the State party amount to violations of article 19 of the Covenant. From the material before the Committee, it transpires that the author's activities were qualified by the courts as applications to hold public events and were refused on the basis that the locations chosen were not among those permitted by the town's executive authorities. In the Committee's opinion, the above actions of the

⁷ See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 6.4.

⁸ See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 50, which states that "a system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor"; and, for example, communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003.

authorities, irrespective of their legal qualification, amount to de facto limitations of the author's rights, in particular the right to impart information and ideas of all kind, under article 19, paragraph 2, of the Covenant.

10.3 The Committee has next to consider whether the restrictions imposed on the author's freedom of expression are justified under any of the criteria set out in article 19, paragraph 3, of the Covenant. The Committee recalls in this respect its general comment 34, in which it states, *inter alia*, that the freedom of expression is essential for any society and a foundation stone for every free and democratic society.⁹ It notes that article 19, paragraph 3, allows restrictions on the freedom of expression only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The Committee observes that, in the present case, the State party has failed to invoke any specific grounds on which the restrictions imposed on the author's activity would be *necessary* within the meaning of article 19, paragraph 3, of the Covenant. The Committee recalls that it is up to the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party introduces a permit system aimed at striking a balance between an individual's freedom of speech and the general interest of maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant.¹⁰ The Committee observes that limiting pickets to certain predetermined locations, regardless of the kind of manifestation or the number of participants, raises serious doubts as to the necessity of such regulation under article 19 of the Covenant. The Committee considers that, in the circumstances of the case, the prohibitions imposed on the author, although based on domestic law, were not justified pursuant to the conditions set out in article 19, paragraph 3, of the Covenant. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant have been violated.¹¹

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of the author's rights under article 19, paragraph 2 of the Covenant and under article 1 of the Optional Protocol to the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include compensation as well as reimbursement of the legal costs paid by the author. The Committee invites the State party to review the relevant legislation on the organization of public events with a view to aligning it with the requirements of article 19 of the Covenant. The State party should also ensure that no similar violations occur in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State

⁹ See the Committee's general comment 34 (2011), para. 2.

¹⁰ See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

¹¹ See also communications No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 7.3; and No. 1009/2001, *Shchetko v. Belarus*, Views adopted on 11 July 2006, para. 7.5.

party to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**BB. Communication No. 1912/2009, *Thuraisamy v. Canada*
(Views adopted on 31 October 2012, 106th session)***

<i>Submitted by:</i>	Ganesaratnam Thuraisamy (represented by counsel, Kathleen Hadekel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	28 October 2009 (initial submission)
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issues:</i>	Non-substantiation; incompatibility with the Covenant; and non-exhaustion of domestic remedies and non-substantiation
<i>Substantive issues:</i>	Right to liberty and security; torture and cruel and inhuman treatment, right to life
<i>Articles of the Covenant:</i>	6, paragraph 1; 7; 9, paragraph 1
<i>Articles of the Optional Protocol:</i>	2, 3 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2012,

Having concluded its consideration of communication No. 1912/2009, submitted to the Human Rights Committee by Ganesaratnam Thuraisamy under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ganesaratnam Thuraisamy, a Tamil of Sri Lankan citizenship, who was born in 1949 in Sri Lanka (Northern Province). He claims that his deportation from Canada to Sri Lanka would amount to a violation of articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant. The author is represented by counsel, Kathleen Hadekel.¹

1.2 On 4 November 2009, pursuant to rule 92 of its Rules of Procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iualia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual (dissenting) opinion by Mr. Krister Thelin is attached to these views.

¹ The Optional Protocol entered into force for Canada on 19 May 1976.

requested the State party not to remove the author to Sri Lanka while the communication was under consideration by the Committee.

Facts as presented by the author

2.1 The author is an ethnic Tamil born in the village of Valvettithurai, the village in which the Liberation Tigers of Tamil Eelam (LTTE) have their origins (Jaffna area). In July 1983, during a business trip to Colombo, the author was arrested by the police on suspicion of membership of the LTTE. During the interrogation, he was ill-treated and was only released with the help of a Sinhala fish merchant. From 1984 to 1987, the author ran a fishing business in his village. On 23 June 1987, the author's father was killed and when claiming his body, the author was detained and beaten by the army for six days. He was again arrested and detained by the army in 1989. The detentions of 1987 and 1989 as well as the torture he underwent are attested by a certificate of the Sri Lankan Red Cross Society dated 17 December 2004.² In 1990, when the LTTE took control of the Jaffna Peninsula, the author was approached by them to support the LTTE, which he refused. Nevertheless, he was forced to help them construct bunkers.

2.2 In 1994, while on his way to Valalai on business, the author was arrested by the army, hit with a gun butt, kicked and then intimidated to refrain from reporting the incident. In October 1995, as the LTTE had ordered all civilians to leave Jaffna, the author and his family fled to Mannar and stayed there in a refugee shelter. In July 1997, during crossfire between the LTTE and the regular army, the author was arrested in Mannar and kept for nine days in detention.³ In August 1999, the army arrested more than 1,000 persons, including the author, who was threatened to be killed if he did not disclose the location of LTTE camps. In May 2000, the author was imprisoned again by the army in Mannar for 10 days. He was beaten with plastic pipes, barbed wire and boots, which injured him on the chest (attested by a medical certificate).⁴ In October 2001, the author returned to his village with his wife and son. As the army suspected that the family had accommodated the LTTE, they detained them for five days for further investigation. On 23 September 2002, the author was detained by the LTTE for five days and was accused of being unpatriotic. He was released under the condition that he supported their endeavour; otherwise his son would be taken away.

2.3 Following this incident, the author had sleeping problems and suffered from depression. The author started to hide from the LTTE, but he was also sought after by the army. With the help of his wife's brother, the author and his family moved to Colombo, where an agent helped the author to flee the country. He left Sri Lanka on 14 November 2002 and arrived in Canada on 30 November 2002.

2.4 On 22 June 2004, the author's claim for asylum was rejected by the Refugee Protection Division of the Immigration and Refugee Board (IRB). The IRB based its decision on the official version of events in Sri Lanka and therefore rejected his version as lacking credibility. On 29 October 2004, his application for leave to seek judicial review of this decision was rejected without reasons by the Federal Court. On 14 September 2007, the

² During the domestic proceedings in Canada, while contesting the credibility of some of the author's allegations, the State party authorities accepted the veracity of the report provided by the Sri Lankan Red Cross Society dated 17 December 2004.

³ The author does not specify whether he was arrested by the army or the LTTE.

⁴ The author has provided a medical report established by the "Centre de santé et de services sociaux de la Montagne" in Montreal dated 26 June 2009, which states that the author alleged having been beaten on his chest with barbed wire; and that he has physical signs of ill-treatment which seem compatible with the author's story.

author's application for permanent residence on humanitarian and compassionate grounds (H&C) was rejected. Due to limited financial means, the author did not appeal against this decision. On 17 September 2007, his pre-removal risk assessment (PRRA) application was also rejected. While taking into account human rights problems in Sri Lanka with regard to Tamil civilians, the PRRA officer noted that the author did not fit the profile of a young Tamil male likely to be targeted by the LTTE or the authorities. On 31 October 2007, the Federal Court rejected the author's motion for stay of his deportation and ordered his removal for 1 November 2007.

2.5 On 22 and 29 October 2007, upon the advice of a new lawyer who told him that the first PRRA and H&C applications had not been filed in a manner that would guarantee a positive outcome, the author filed a second PRRA and H&C application, submitting new evidence. The author submitted a letter from a Justice of the Peace in Sri Lanka, which details the suffering of his wife and son since his departure and specifically mentions that his son had been arrested and asked by the authorities about the whereabouts of the author.

2.6 In the hope that these procedures would be successful, the author did not appear for his deportation on 1 November 2007. He acted in good faith, believing that a decision should be rendered on a properly prepared application prior to his removal from Canada. The author did not try to hide from the authorities. He continued to live in the same apartment as prior to the removal order. While the second procedure was ongoing, the author received notification that on 5 February 2008 the Federal Court had rejected without reasons the author's application to seek judicial review of the first negative PRRA decision.

2.7 On 21 May 2009, the author was convoked to an interview, during which he received the two negative decisions on his second H&C and PRRA applications. The decisions found that the alleged persecutions of his wife and son were not sufficient to establish a personalized risk of persecution or torture for the author. Following this interview, he was detained by the Border Services Agency. On 25 May 2009, the author was granted conditional release. On 4 September 2009, the Federal Court rejected without reasons the author's applications for judicial review of the second H&C and PRRA decisions.

The complaint

3.1 The author submits that his deportation from Canada to Sri Lanka exposes him to a real risk of arbitrary detention, torture, cruel and inhuman treatment, including death. In the past, he had been detained and questioned on several occasions by the army and bears scars from the torture to which he had been subjected by the authorities. In this regard, the State party, in the first H&C decision, has accepted the 1987 and 1989 detentions as proven, on the basis of confirmation from the Sri Lankan Red Cross Society.

3.2 The author further submits that the risk of being arbitrarily detained upon arrival at the airport in Sri Lanka has been documented in the media and by the European Court of Human Rights (ECHR) in similar cases,⁵ in particular as the author has been arrested in the past for suspicion of being an LTTE member and also as he is a rejected asylum seeker coming from abroad. He also underlines that the request for travel documents presented by the Canadian authorities to the Sri Lankan authorities would alert the Sri Lankan authorities of his return and would enhance his risk of being arbitrarily detained, tortured and mistreated upon his arrival. Even if he was able to pass through the airport checks without being arrested, he would be at risk in Colombo, as he is a Tamil from the North, which is

⁵ The author refers to ECHR, *NA v. The United Kingdom*, Judgment of 6 August 2008 (Appl. No. 25904/07), paras. 145–147.

mentioned on his identity card. He also notes that he would not be able to travel to the North, due to travel restrictions for Tamils and even if he were to travel to his village of origin, he may face arbitrary detention and torture, as displaced persons continue to be interned in the North. He therefore submits that his deportation by the State party to Sri Lanka would constitute a violation of his rights under articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant.

3.3 The author underlines that the situation in Sri Lanka has evolved significantly since April 2009, when the State party made its most recent substantive decisions concerning the author. In the interim, the Sri Lankan authorities declared a military victory over the LTTE, and the open warfare between the LTTE and the government forces has therefore not subsided. However, in the aftermath of the military victory by the government forces, repression and mistreatment of Tamil civilians have not subsided. They continue to be subject to ongoing arrest, harassment and persecution in Colombo, as well as internment in the North and East. With regard to internal flight alternatives for Tamils from the North, the author cites the Office of the United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, which highlight that Tamils from the Northern area are at heightened risk of human rights violations in the whole Sri Lankan territory.⁶ Those guidelines further establish that it is not possible to identify particular categories of Tamils at risk and that in asylum claims by Tamils from the North of Sri Lanka, well-founded fear of persecution should be presumed.

3.4 The author further cites reports by the International Crisis Group and Human Rights Watch on the conditions in detention camps of internally displaced persons in Vavuniya district. He also cites an assessment by Amnesty International Canada on his specific case, stating that he is at serious risk of facing grave human rights violations should he be returned to Colombo. Indeed, the opinion letter dated 1 June 2009 states that Amnesty International is of the view that, as an ethnic Tamil male and failed asylum seeker, who is originally from Valvettithurai in Jaffna, and must, upon return reside in Colombo, the author is at serious risk of facing grave human rights violations.

3.5 In his communication, the author challenges the refugee determination and asylum procedures. He considers that the IRB decision questions his credibility on minor discrepancies, based on the divergence between the information provided by the author on the conflict and the official information received from the Sri Lankan authorities. In the author's opinion one should never expect the agent of persecution to offer a transparent account of the facts and therefore the official account of the events is biased. The IRB did not at all consider the outstanding issue of persecution of the Tamil civilian population by the Sri Lankan authorities. The author also criticizes the fact that Canadian legislation does not offer any possibility to appeal the merits of an IRB decision. In this regard, as only new evidence can then be presented in the framework of the PRRA application, the latter was never meant to be an appeal against the IRB procedure, which the author deplores.

3.6 While the PRRA officer in the first PRRA application procedure did take note of numerous human rights violations against the Tamil population and the fact that the entire Tamil population, and particularly those who, like the author, hail from the North or East of the country are at risk of persecution or mistreatment, the officer concluded that the author would not face such treatment because he is not a young Tamil male. The only evidence related to that profile was related to the risk of forced recruitment of young Tamils by the LTTE or the Karuna faction. As for the H&C application, the assessment was also done by

⁶ See *UNHCR Eligibility Guidelines for Assessing the Internal Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009).

a PRRA officer using the same reasoning. It therefore led to the same conclusion as the PRRA.

3.7 As for the second PRRA application procedure, the assessment made by the officer who was the same as in the first procedure is essentially cut and paste from the first decision despite the new developments in Sri Lanka and the voluminous new evidence submitted. While acknowledging that the Sri Lankan authorities maintain checkpoints to try to intercept LTTE sympathizers, and human rights abuses such as arbitrary arrest and detention, torture and discrimination against Tamils especially from the East and North continue to occur, the PRRA officer concluded that the author who is a Tamil would not face such treatment. The author therefore considers that the PRRA assessment was biased and unfair.

State party's observations on admissibility and merits

4.1 In its submission on the admissibility and merits of the communication transmitted on 4 May 2010, the State party notes that the author based his communication on precisely the same story, evidence and facts that a competent domestic tribunal and expert risk assessment officer have determined not to be credible, and not supporting a finding of a substantial personal risk of torture or cruel or inhuman treatment in the future.

4.2 The State party contends that the author's allegations with respect to articles 6, paragraph 1, and 7 are inadmissible on the ground of non-exhaustion of domestic remedies since the author has submitted to the Committee two pieces of evidence (a medical report and a letter from Amnesty International) that could have been submitted to domestic authorities. The documents could still be the basis of renewed PRRA or H&C applications. The author has also failed to exhaust domestic remedies by not applying for judicial review of the negative decision in his first H&C application. In the alternative, the author's communication with respect to article 6, paragraph 1, and 7 should be declared inadmissible pursuant to article 2 of the Optional Protocol on the grounds of non-substantiation. The author's assertions are not credible and there is no objective evidence to support a finding that the author is at personal risk if he returns to Sri Lanka.

4.3 As for the author's allegations in relation to article 9 of the Covenant, the State party submits that they are incompatible with the provisions of the Covenant pursuant to article 3 of the Optional Protocol or, in the alternative, that they are inadmissible on the ground of non-substantiation under article 2 of the Protocol. The State party is of the view that article 9 of the Covenant has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. In the event that the Committee would declare part or all of the allegations admissible, the State party requests that the Committee finds them without merits.

4.4 The State party observes that in support of his refugee claim dated 5 December 2002, the author alleged that between 1983 and 2002 when he left Sri Lanka, he was targeted by the LTTE for support and for money. In turn, the Sri Lankan security forces suspected him of being a member of the LTTE and detained, interrogated, beat and harassed him. His troubles allegedly began in 1983 when he was arrested by the police in Colombo and was ill-treated during his questioning. In 1987, his father was killed in crossfire in a fight between the LTTE and the army. When the author went to claim the dead body, the army arrested and beat him, and detained him for six days. In June 1990, the LTTE approached him for his support, and when he refused, forced him to dig bunkers. In August 1991, the LTTE demanded money from him. In March 1994, he was allegedly arrested by the army, hit by a gun butt and kicked, and had his gold chain, ring, watch and money taken from him. In July 1997, he was allegedly arrested in a round-up, and was interrogated for nine days, and not given adequate food and water. He was rounded up again by the army in November 1998 and insulted.

4.5 The State party adds that, according to the author, he was arrested in August 1999 as part of a round-up of 1,000 persons from his area, questioned and threatened until released the same day. In May 2000, the author was allegedly arrested by the army following a grenade-throwing incident. He was allegedly beaten with plastic pipes, barbed wire and boots. In October 2001, when he, his wife and their teenage son were on their way to Valvettithurai, they were arrested by the army and detained for five days. They moved to Valvettithurai where in September 2002, the LTTE allegedly detained him for five days, accusing and assaulting him. He was released after his wife paid the LTTE the money they wanted. He was asked to report back in December 2002. The LTTE told him that if he did not support them regularly, they would take his only son with them. He went into hiding and heard that the army had come looking for him. He and his family went to Colombo where he was introduced to an agent who offered to help him flee the country. The agent said he would help the author's wife and son in due course. The author therefore fled to Canada while his wife and son stayed in Colombo.

4.6 On 11–12 May 2004, the Refugee Protection Division of Canada's Immigration and Refugee Board heard the author's claim. The author was assisted by counsel and provided documentary evidence and oral testimonies. He had the possibility to explain any ambiguities or inconsistencies. On 18 June 2004, the IRB which is an independent and specialized tribunal found that the author was not a Convention refugee and not a person in need of protection. The IRB considered that the author's lack of credibility was determinative of his claim. For instance, the author claimed in his Personal Information Form (PIF) that he did not know where his wife was when he had told the IRB that he telephoned her every month. Moreover, he claimed in his PIF that he and his wife moved to Colombo in November 2001 when he had later told the IRB that he had learned in December 2002 that his wife and son lived in Colombo. When asked about these inconsistencies, he replied that the PIF had been filled in in English which he did not master. However, at the start of the hearing, he affirmed that he fully understood the entire contents of the PIF. The IRB considered that this undermined his credibility.

4.7 The author submitted a letter from a Sri Lankan lawyer in an attempt to corroborate his story. However, the information provided in the letter contradicts statements made earlier by the author such as the fact that contrary to what he had stated, the author had been in Valvettithurai several times between 1995 and 2002. The author submitted a letter from another Sri Lankan lawyer stating that his son had been arrested on 9 February 2002 under the Internal Security Act on suspicion of belonging to a terrorist movement, when the police report that the author also mentioned that he had been arrested for not having a National Identity Card, and that the son was found to have no connection with a terrorist movement. The IRB also rejected the fact that during the hearing the author referred to important elements such as his son's repeated arrests which he had not mentioned in the PIF. The IRB could not understand why the author would return to Valvettithurai in 2002, which is the place where the LTTE have their origin, if he feared the LTTE. The author's return there was inconsistent with his alleged fear. Finally, the IRB considered it was inconsistent for the author to have stayed in Sri Lanka for almost 20 years since he first started having problems. In particular, the author stated that his detention in 2000 was the worst he had experienced. Still, he waited another two years before he fled to Canada. On 29 October 2004, the Federal Court denied the author's application for leave to apply for judicial review of the IRB decision on the ground that there was no fairly arguable case or a serious question to be determined.

4.8 On 11 February 2005, the author applied for permanent residence in Canada based on humanitarian and compassionate grounds. In support of his application, he claimed that both sides, the army and the LTTE, were looking for him, and that his wife and son were hiding. He also stated that his land and house had been washed away by the tsunami. The State party submits that the assessment of an H&C application consists of a broad,

discretionary review by an officer to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. When allegations of risk upon return are made, as in the author's case, the officer assesses the risk a person may face in the country to which he would be returned. In cases such as the author's where the application is based on risk in the country of origin, a specifically trained PRRA officer assesses the H&C application.

4.9 On 17 September 2007, the author's application was rejected. The PRRA officer assessing the H&C application accepted that the author's house and land had been destroyed by the 2004 tsunami, but considered that the tsunami was a natural disaster that affected the entire coastal population of Sri Lanka. The officer did not believe the author's allegation that his house had been destroyed in a bombing, since it was contradicted by his allegation that it was destroyed by the tsunami, and since the photos of the destroyed house had only been submitted to Canadian authorities after the time of the tsunami. As for the evidence submitted such as a letter from the Sri Lankan Red Cross Society dated 2004 and a letter from his Sri Lankan lawyer dated 2003, they mentioned the author's arrests and torture of 1987 and 1989 only and did not refer to more recent arrests. The officer considered the human rights situation in Sri Lanka prevailing at the time of his decision and admitted that it was marked by extrajudicial murder by both the Government and the LTTE and other serious human rights violations. However, even accepting that the author had been arrested in 1987 and 1989, he had not established that he had had problems with either side since then. Therefore, there was insufficient proof that the author faced a personal risk to his life or security if returned to Sri Lanka. The author did not have the personal profile of a "young Tamil" who risked forced recruitment by the LTTE or who would be suspected by security forces of being a member or supporter of the LTTE. The author did not apply to the Federal Court for leave to apply for judicial review of this negative decision, as was his right.

4.10 The State party emphasizes that the risk assessment is performed by highly trained officers who consider the Canadian Charter of Rights and Freedoms as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Declaration of the Rights and Duties of Man. They also keep up-to-date with new developments in the areas concerned and have access to most recent information on the matter. On 17 September 2007, the PRRA application was rejected. The PRRA decision was based on the same grounds as the decision on the H&C application.

4.11 On 23 October 2007, the author applied to the Federal Court for judicial review and on 24 October 2007, he applied for a stay of removal pending a decision on his leave application. While it considered that the situation in Sri Lanka was no doubt alarming and while there may be massive violations of human rights in that country, the Court considered that the author had not succeeded, as recognized by the PRRA officer, in showing that he would be personally at risk. The Court therefore rejected the author's application for a stay of removal. The author's deportation was set for 1 November 2007. The author failed to appear for his scheduled removal and remained in Canada illegally. On 5 February 2008, the Court denied leave to apply for judicial review of the negative PRRA decision.

4.12 On 22 October 2007, at about the same time as he was seeking judicial review of his first PRRA decision, the author applied for another PRRA. His claim was essentially the same. The author added information related to his wife and son who had allegedly stayed for two years outside Sri Lanka travelling in neighbouring countries. Upon their return, the author's son was allegedly arrested on several occasions. The PRRA officer only considered the elements of proof that post-dated the first PRRA application. The author's application was rejected on the basis that the author did not fit the profile of a Tamil who would be subject to persecution, that his situation was no different from that of all the

Tamils living in Sri Lanka and that he would not face more than a mere possibility of persecution. The Federal Court denied the author's application for judicial review on 4 September 2009. As for the author's second application for a residence permit based on humanitarian and compassionate grounds that he submitted on 29 October 2007, it was rejected on 21 April 2009. His application for leave for judicial review was denied on 4 September 2009.

4.13 The State party contends that the author has not exhausted domestic remedies in relation to his claims under articles 6, paragraph 1, and 7 as he has submitted two pieces of evidence to the Committee that post-date the decisions made in the author's latest PRRA and H&C applications and as such, have not been considered by the domestic authorities. These documents are a medical report dated 26 June 2009 and a letter from Amnesty International dated 1 June 2009. The State party relies on the Committee's jurisprudence in *Dawood Khan v. Canada*, where it has considered that the author should have submitted the said medical report to the domestic remedies before submitting his communication to the Committee. The Committee considered that it was not too late to request a new PRRA or application for permanent residence on humanitarian and compassionate grounds based on the new reports.⁷ The State party also contends that the author has failed to exhaust domestic remedies as he did not apply for judicial review against the first decision on the H&C application dated 14 September 2007 (see para. 4.10 above).

4.14 The State party further contends that the author has not sufficiently substantiated his claims under articles 6, paragraph 1, and 7 of the Covenant. Despite the defeat of the LTTE in May 2009, the author alleges that he remains at risk from Sri Lankan authorities because he is an ethnic Tamil from the North of Sri Lanka, he has been previously detained by the army and his body bears the scars of past torture. The communication is based on the same facts and largely the same evidence as were presented to the Canadian tribunals and risk assessment officer, whose decisions were reviewed and upheld by the Federal Court. There is no explanation provided as to why either of the documents now available to the Committee could not have been obtained during the course of the author's more than five years of domestic proceedings. Without wishing to appear to prejudge the probative value of those documents, which is a role properly attributed to the independent PRRA officer on any future application for protection, the State party notes that the two documents are not based on independent knowledge of his personal situation. The medical report merely confirms that he has scars on his chest that are compatible with his story of past torture. With respect to the letter from Amnesty International, it speaks generally of the risks that the author faces because of his profile as an ethnic Tamil male from northern Sri Lanka who is a failed asylum seeker and has claimed to have suffered past abuse.

4.15 As such, there is nothing to suggest that the author is at personal risk of torture or ill-treatment in Sri Lanka. The State party recalls that it is not the role of the Committee to re-evaluate facts and evidence unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice. The material submitted by the author cannot lead to such a conclusion. However, should the Committee decide to re-evaluate findings with respect to the author's credibility, a consideration of the totality of the evidence permits only one conclusion, which is that the author's allegations are not credible. In this regard, the State party refers to the inconsistencies pointed out by the IRB as referred to above (see paras. 4.6–4.7).

⁷ The State party refers to communication No. 1302/2004, *Dawood Khan v. Canada*, Inadmissibility Decision adopted on 25 July 2006, para. 5.5.

4.16 As for the human rights situation in Sri Lanka, the State party refers to the jurisprudence of the United Nations Committee against Torture in *V.N.I.M v. Canada*⁸ in which it found the author's allegations not to be credible or corroborated by objective evidence. It therefore considered that as such it was not necessary to examine the general human rights situation in the country of return. Even if Tamils are subjected to being stopped and questioned at security checkpoints and human rights abuses against some Tamil men continue to be reported in Sri Lanka, this is not sufficient by itself to be the basis of a violation of the Covenant if the author is returned there. However, should the Committee wish to consider the general situation of human rights in Sri Lanka, the State party contends that the situation has been improving since the Government's defeat of the LTTE in May 2009. The resettlement of internally displaced persons is proceeding at a rapid pace, and the Government has increased its military and police presence in the north and east of the country to maintain peace.⁹ The State party further argues that about 20 per cent of Colombo residents are Tamils and anyone can stay in Colombo without having to give prior notice to the local authorities, although they have to register with the local police. While the number of checkpoints has not been significantly reduced in Colombo, no arrest has been reported at those checkpoints since June 2009. The State party therefore considers that there are viable internal flight alternatives for the author and the latter has not shown that he could not safely live in Colombo should he prefer not to return to his area of origin. The State party concludes that the author has not sufficiently substantiated that he faces a personal risk of a violation of article 6, paragraph 1, or article 7 of the Covenant. His claims in this regard are therefore inadmissible pursuant to article 2 of the Optional Protocol.

4.17 As for the author's allegations related to article 9, paragraph 1, the State party reiterates that this part of the communication should be declared incompatible with the provisions of the Covenant. The author has not alleged that the State party has arrested or detained him in violation of article 9, paragraph 1, but that by deporting him to Sri Lanka where he might be arbitrarily detained, the State party would violate this provision. It emphasizes the limited number of rights to which the Committee has given extraterritorial application, article 9, paragraph 1, not being one of those. The State party quotes general comment No. 31 which states that only the most serious breaches of fundamental rights can constitute exceptions to the power of the State to determine the conditions for allowing foreigners to enter and remain on its territory. The State party submits that arbitrary arrest or detention does not rise to the level of grave and irreparable harm contemplated in general comment No. 31.¹⁰ The State party therefore requests that article 9, paragraph 1, be considered inadmissible as incompatible with the provisions of the Covenant. In the alternative, it requests the Committee to find it inadmissible for non-substantiation.

4.18 In the alternative, the State party requests the Committee to reject the author's claims as being without merits.

4.19 Finally, and in reply to the criticisms made by the author on the refugee determination and asylum procedure, the State party reminds the Committee that it is not

⁸ The State party refers to Convention Against Torture communication No. 119/1998, *V.N.I.M v. Canada*, Views adopted on 12 November 2002, paras. 8.4 and 8.5.

⁹ The State party refers to the *South Asia Intelligence Review*, "Sri Lanka: approximating Normalcy" (30 November 2009); and "Progress in Sri Lanka, speech by Robert O. Blake (8 December 2009).

¹⁰ The State party refers to general comment 31 on article 2 of the Covenant regarding the nature of the general legal obligation imposed on States parties to the Covenant, 2004.

within its competence to consider the Canadian system in general, but only to examine whether, in the present case, it complied with its obligations under the Covenant.¹¹

Author's comments on the State party's observations

5.1 On 24 June 2010, the author rejects the State party's observations stating that they only concentrate on the admissibility of the case. The State party limits itself to stating that the case is without merits without supporting its argument. The author therefore focuses in his comments on the admissibility of the communication. As for the merits of the communication, the author's original submission has already addressed this aspect.

5.2 The author rejects the State party's contention that the domestic remedies have not been exhausted. Neither a renewed PRRA application nor a renewed H&C application would protect the author against deportation from Canada. Indeed, the State party's legislation expressly provides that such application does not entitle the author to a stay of removal pending determination thereof. Moreover, the State party's position is disingenuous insofar as, in the domestic context, it takes the position that such evidence would not be admissible in the context of a renewed PRRA or H&C application, as it could have been available at the time of previous applications. In the present case, the PRRA officer who determined the author's second PRRA application refused to consider evidence that related to facts predating the first PRRA. Thus, the medical report in question would not be assessed in a renewed PRRA as it related to old facts.

5.3 In the H&C context, in domestic litigation, the State party takes the position that the doctrine of *res judicata* applies to all issues that have been previously decided or could have been raised by the author in the course of a previous application and that, as such, evidence that could have been filed in support of a previous application will not be considered. Thus, the author rejects the State party's argument that he could file this evidence in support of a renewed PRRA or H&C, given that the State party's position in the domestic context is precisely that such evidence need not be considered in the context of such applications.

5.4 Moreover, the medical report simply confirms that the author bears scars on his chest and abdomen, a fact that was alleged in his refugee claim, PRRA and H&C applications and the veracity of which was never denied by the State party. The situation therefore differs markedly from that in *Dawood Khan v. Canada* where the evidence in question was a psychological report diagnosing the author with post-traumatic stress disorder, a fact novel to the proceedings. Further, the Amnesty International opinion letter does not present any new facts. It simply reviews the publicly available information on Sri Lanka and offers its opinion on the author's situation. The non-production of this letter earlier cannot constitute non-exhaustion of domestic remedies.

5.5 As for the State party's contention that the author failed to exhaust domestic remedies by not applying for judicial review against the negative decision on his first H&C application, the author considers it without merits. The author filed a new H&C application which was rejected. Had he sought judicial review and had judicial review been granted, the Federal Court would have done no more than to order the State party to redetermine the H&C application which has already been done in this case in the context of his refiled H&C application. For all these reasons, the author considers that he has exhausted domestic remedies. Indeed, the only reason why he remains in Canada is because the Committee

¹¹ The State party refers to the jurisprudence of the Committee against Torture in communication No. 15/1994, *Tahir Hussain Khan v. Canada*, Views adopted on 15 November 1994, para. 12.1.

issued a request for interim measures demanding that the State party withhold his deportation.

5.6 With regard to the State party's contention that the author failed to substantiate a risk under article 6, paragraph 1, and article 7 of the Covenant, the author replies that the PRRA officer recognized the risks faced by ethnic Tamils from the North and East of Sri Lanka, but failed to properly apply the law to those accepted facts. The evidence submitted by the author clearly discloses a risk of death and torture or cruel, inhuman or degrading treatment. Indeed, it was on the basis of that evidence that the Committee issued a request for interim measures of protection.

5.7 The State party takes the position that the author's account is not credible and not supported by objective evidence. However, not only do the author's submissions demonstrate that the real risk of violations of articles 6, paragraph 1, 7 and 9 of the Covenant do not in any way depend on those allegations that the State party has deemed non-credible, but the claim that the risks are not supported by objective evidence is not founded. There is voluminous documentary evidence demonstrating the risks faced by someone with the author's profile. Furthermore, while the State party takes the position that the author has an internal flight alternative in Colombo, where it says that he can reside provided that he registers with the police, the 2009 United States Department of State country report on human rights practice in Sri Lanka published on 11 March 2010 states that Colombo police refused to register Tamils from the north and east, as required by Emergency Regulation 23, sometimes forcing them to return to their homes in areas affected by the conflict. Therefore Colombo is not safe for the author. The State party mentions that Tamils from the west might be questioned at checkpoints. This is precisely the situation of the author. Moreover, questioning by the Sri Lankan authorities frequently involves violations of article 7 of the Covenant. The author's communication in this regard is therefore sufficiently substantiated.

5.8 With regard to the State party's contention in relation to article 9 of the Covenant, while the author does not take issue with the State party's position that detention per se or even arbitrary detention per se, may not constitute irreparable harm, in the present case, the author's submissions make clear that the risk of arbitrary detention of the author in Sri Lanka brings with it the risk of torture or cruel and unusual punishment while in detention. Thus the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of article 7 of the Covenant.

5.9 The author considers that as such, whatever the merits or demerits of the system may be, the fact remains that the system failed to protect the author's most fundamental rights and it now falls to the Committee to make this assessment.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author has not exhausted domestic remedies because he has submitted two new pieces of evidence to the Committee that were not previously examined by domestic authorities; and that he failed to apply for judicial review of the first H&C application which had been rejected on 14 September

2007. The Committee notes the author's argument that the position of the State party is to reject evidence that relates to facts predating the first PRRA application procedure, which is the case with the two documents mentioned; and that those documents only corroborate the author's allegations previously rejected for lack of credibility. The Committee further notes the author's contention that he filed a new H&C application which was rejected; and that neither a renewed PRRA application nor a renewed H&C application would protect the author against deportation from Canada, therefore not providing an effective remedy to the author.

6.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.¹² The Committee notes that, throughout the proceedings, the author has claimed to have been tortured. In the light of the information available to it, the Committee considers that none of the two avenues mentioned by the State party (PPRA application and H&C application) in the present circumstances would have the effect of staying or preventing the author's deportation to Sri Lanka. The Committee further considers that given the current legislation in the State party and the nature of the documents concerned, it is unlikely that they would have changed the outcome of the proceedings. The Committee therefore considers that it is not precluded from considering the author's claims pursuant to article 5, paragraph 2 (b), of the Protocol.

6.5 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to substantiate the author's claims under articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant. As far as article 6 is concerned, the Committee notes that the information submitted to it does not provide sufficient grounds to believe that the author's expulsion to Sri Lanka would expose him to a real risk of a violation of his right to life. The author's contentions in this respect are general allegations mentioning the risk of arbitrary arrest and detention, which could ultimately lead to his death, but without reference to any particular circumstances suggesting that his life would be in danger. In these circumstances, the Committee considers that the author has not sufficiently substantiated his claims under article 6 of the Covenant. The Committee therefore declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

6.6 With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that this provision has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. The Committee takes note of the author's allegations that the risk of his arbitrary detention in Sri Lanka brings with it the risk of torture or cruel and unusual punishment while in detention. The Committee therefore concludes that the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of article 7 of the Covenant.

6.7 As for the author's claims under article 7 of the Covenant, the Committee notes that he has explained the reasons why he feared to be returned to Sri Lanka, based on the arrests and treatment he allegedly suffered both in the hands of the authorities and the LTTE. The Committee also notes that the author has provided documentary evidence in support of such claims which are serious enough to be considered on the merits. The Committee

¹² See communication No. 1959/2010, *Jama Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; communication No. 1003/2001, *P.L. v. Germany*, Decision on admissibility of 22 October 2003, para. 6.5; and communication No. 433/1990, *A.P.A. v. Spain*, Decision on admissibility of 25 March 1994, para. 6.2.

accordingly finds the author's claims under both articles 7 and 9 admissible and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee considers it necessary to bear in mind the State party's obligation under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.

7.3 The Committee notes the author's claim that as an ethnic Tamil from the North of Sri Lanka, who has in the past been detained on several occasions and tortured by the Sri Lankan army, as evidenced by the scars he retained on his chest, he faces a real risk of being subjected to treatment contrary to article 7 of the Covenant if returned. The Committee notes the State party's contention that the author's applications before domestic authorities were essentially rejected on the grounds that the author lacked credibility, having noted inconsistencies in his statements and the lack of evidence in support of his allegations. The Committee further notes the State party's argument, as evidenced by the PRRA officer at national level, that even accepting that the author had been arrested in 1987 and 1989, he had not established that he had had problems with either the army or the LTTE since then; and therefore, there was insufficient proof that the author faced a real risk for his life or security if returned to Sri Lanka. The Committee finally notes the State party's argument that the author does not fit the profile of the young Tamil male who would be subject to persecution, and that his situation is no different from that of all the Tamils living in Sri Lanka.

7.4 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm.¹³ The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such risk exists.¹⁴

7.5 In the circumstances of this case, the Committee finds that insufficient weight was given to the author's allegations of a real risk of being tortured if deported to his country of origin, given the high prevalence of torture in Sri Lanka.¹⁵ The Committee notes that the inconsistencies highlighted by the State party were not directly related to his claim of having been tortured and cannot in themselves vitiate the whole credibility of the author's allegations with regard to his past torture and harassment by both the army and the LTTE. Contrary to the State party's assumption that the author did not support his claim of having been tortured by the army after 1989, the author pointed to scars on his chest as evidence of recent torture. This physical evidence should have been enough for the State party authorities to request an independent expertise on the possible causes for those scars and their age.

¹³ See general comment No. 31[80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12.

¹⁴ See communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; see also communication No. 1819/2008, *A.A. v. Canada*, Decision on admissibility adopted on 31 October 2011, para. 7.8.

¹⁵ See communication No. 1763/2008 (footnote 14 above).

7.6 Indeed, it was for the IRB and PPRA officers to dispel any doubts that might have persisted as to the cause of such scarring.¹⁶ The State party failed to direct an expert opinion as to the causes and age of the scars observed on the author's chest and based its decision to reject the author's asylum claim merely on inconsistencies that are not central to the general allegation faced by the author as an ethnic Tamil from the North of Sri Lanka.

7.7 The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the author's allegations of torture and the real risk he might face if deported to his country of origin, in the light of the documented prevalence of torture in Sri Lanka. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee considers that further analysis should have been carried out in this case.¹⁷ The Committee therefore considers that the removal order issued against the author would constitute a violation of article 7 of the Covenant if it were enforced.

7.8 In the light of its findings on article 7, the Committee does not deem it necessary to further examine the author's claims under article 9 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to Sri Lanka would violate his rights under article 7 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of the author's claim regarding the risk of treatment contrary to article 7, should he be returned to Sri Lanka, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

¹⁶ See ECHR, *R.C. v. Sweden*, Appl. No. 41827/07, Judgment of 9 June 2010, para. 53.

¹⁷ See communication No. 1763/2008 (footnote 14 above).

Appendix

Individual (dissenting) opinion of Mr. Krister Thelin

The majority has admitted the author's claim under article 7 of the Covenant, considered it on the merits and found a violation. I disagree.

The Committee is in essence asked, and the majority has agreed thereto, to act as a fourth instance, even though it is clear from the Committee's jurisprudence that, as a general rule, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether the alleged risk exists. The exception to this general rule is where the evaluation was clearly arbitrary or amounted to a denial of justice. That is not the case in the communication before us, and, therefore, the claim should not have been admitted. (See my dissenting opinion in communication No. 1763/2008, *Pillai et al. v. Canada* with references)

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**CC. Communication No. 1913/2009, *Abushaala v. Libya*
(Views adopted on 18 March 2013, 107th session)***

<i>Submitted by:</i>	Hisham Abushaala (represented by Rachid Mesli of Al Karama for Human Rights)
<i>Alleged victims:</i>	Abdelmataleb Abdulghader Mohsen Abushaala (author's brother), the author and his parents
<i>State party:</i>	Libya
<i>Date of communication:</i>	11 August 2009 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Lack of cooperation from the State party
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of all persons deprived of their liberty to be treated with humanity and dignity, recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
<i>Article of the Optional Protocol:</i>	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2013,

Having concluded its consideration of communication No. 1913/2009, submitted to the Human Rights Committee by Hisham Abushaala under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 11 August 2009, is Hisham Abushaala, a Libyan citizen. He claims that his brother, Abdelmataleb Abdulghader Mohsen Abushaala,

* The following members of the Working Group participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iluia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

a Libyan citizen born on 14 March 1975 in Tripoli, is a victim of violations by Libya of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant. The author claims that he himself and his parents are victims of a violation of articles 2 (para. 3) and 7 of the Covenant. The author is represented by Rachid Mesli of Al Karama for Human Rights.

The facts as submitted by the author

2.1 On 17 September 1995, Abdelmotaleb Abdulghader Mohsen Abushaala (Abdelmotaleb Abushaala) went to the Higher Institute of Civil Aviation, where he was a student, to resit an examination. While Abdelmotaleb Abushaala was in the Institute car park, preparing to return home, several armed officers in plain clothes approached him and arrested him using considerable brutality. They punched and kicked him and took him away in his car. The arrest took place in the presence of many witnesses, including the director of the Institute.

2.2 The day following the arrest, Mr. Abushaala's father, Abdelkader Mohammed Abushaala, went to the Institute, where the director confirmed that the son had been arrested by the internal security forces. Fearing reprisals against his family, Abdelmotaleb Abushaala's father contacted family friends and asked them to try to find out why his son has been arrested and where he was being held. These persons went to all Government offices and detention centres but did not manage to obtain any new information.

2.3 When the family heard that many young people were detained at Abu Salim Prison, Abdelmotaleb Abushaala's mother, Mahbouba Wafa, went there but was unable to obtain confirmation that her son was being held at the prison. For several years, she continued to go to the prison and made several attempts to obtain information about her son. She also handed the prison staff food and clothing for her son, which the guards accepted without ever confirming, however, whether or not her son was in the prison. In 2001, Abdelmotaleb Abushaala's parents submitted a written request to the prison management, at the latter's invitation, for information as to whether their son was there. They never received a reply.

2.4 Having heard rumours that many young students were held at Ain-Zara Prison, Abdelmotaleb Abushaala's mother went there several times. She was asked to submit a written request, which she duly did at the beginning of 2002. However, she never received a reply.

2.5 Abdelmotaleb Abushaala's relatives also called on the people's committees of Tripoli to intervene, but to no avail. Between 2002 and 2006, the family tried to find a lawyer to bring legal proceedings, but all the lawyers advised them to resolve the matter amicably and told them that there was no judicial procedure for dealing with such matters.

2.6 In 2008, the victim's family asked the human rights foundation, presided over by Saif Al-Islam Gaddafi, the son of the then Head of State, to intervene, but to no avail. The family still have no news of their son.

The complaint

3.1 Abdelmotaleb Abushaala's parents claim that they did everything possible to find out what had happened to their son. They were unable to bring legal proceedings, as it proved impossible to find a lawyer who was willing to represent them. Recalling the Committee's jurisprudence, the author contends that domestic remedies are neither available nor effective. Therefore, there is no longer any need to apply the criterion of the exhaustion of domestic remedies.

3.2 Abdelmotaleb Abushaala was subjected to an enforced disappearance after his arrest on 17 September 1995, and this was followed by a refusal to acknowledge his deprivation

of liberty. The author recalls the definition of “enforced disappearance” set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance and in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court.

3.3 As a victim of enforced disappearance, Abdelmotaleb Abushaala was de facto prevented, in violation of article 2, paragraph 3, of the Covenant, from exercising his right of recourse to challenge the lawfulness of his detention. His relatives did everything in their power to find out what had happened to him, but the State party took no follow-up action, notwithstanding that it has an obligation to provide an effective remedy by, for example, conducting a thorough and effective investigation.

3.4 The enforced disappearance of Abdelmotaleb Abushaala constituted in and of itself a serious threat to his right to life, amounting to a violation of article 6, insofar as the State party failed in its obligation to protect that fundamental right.

3.5 With regard to Abdelmotaleb Abushaala, the mere fact of being subjected to an enforced disappearance constitutes inhuman or degrading treatment, which is a violation of article 7 of the Covenant. The victim may also have been subjected to physical torture from the time of his arrest, as this is known to be a particularly widespread practice in the State party.

3.6 From the perspective of the author and his family, the victim’s disappearance was, and still is, a paralysing, painful and distressing ordeal, since they have had no news of what has happened to him since 1995. Accordingly, the author alleges that the treatment of Abdelmotaleb Abushaala is a violation under article 7 of his own rights and of those of his parents.

3.7 Abdelmotaleb Abushaala was arrested by the internal security forces without a warrant and without being informed of the reasons for his arrest. This is a breach of article 9, paragraph 1, of the Covenant. He was then arbitrarily detained and has been held incommunicado ever since his arrest on 17 September 1995. He has never been brought before a judicial authority and his detention has never been acknowledged. The authorities continue to conceal the truth about his fate. Abdelmotaleb Abushaala remains arbitrarily deprived of his liberty and security, in violation of article 9. The author recalls the Committee’s jurisprudence, according to which the unacknowledged detention of any individual is deemed to be a very serious denial of article 9.

3.8 It is furthermore claimed that Abdelmotaleb Abushaala has been kept isolated from the outside world since 17 September 1995 and has not been treated with humanity or with respect for the inherent dignity of the human person, and that he is therefore the victim of a violation of article 10, paragraph 1, of the Covenant.

3.9 As a victim of unacknowledged detention and, as such, a person deprived of the protection of the law, Abdelmotaleb Abushaala has been reduced to the status of “non-person”, in violation of article 16 of the Covenant. He has consequently been deprived of his rights under the Covenant.

Lack of cooperation from the State party

4. On 17 November 2009, 9 August 2010, 20 January 2011, 31 May 2011, 15 August 2011 and 26 December 2012 the State party was requested to submit its observations on the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party’s refusal to provide any information on the admissibility and/or merits of the author’s claims. It recalls that in accordance with article 4, paragraph 2, of the Optional Protocol, the State party concerned is required to submit to

the Committee written explanations or statements clarifying the matter and indicating the measures, if any, that have been taken by the State to remedy the situation.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of five reminders having been addressed to the State party, no observations on the admissibility or merits of the communication have been received from the State party. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no reason to consider the communication inadmissible and thus proceeds to its consideration on the merits in respect of the claims made on behalf of Abdelmoteleb Abushaala under articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant. It also notes that issues may arise under article 7 and article 2 (para. 3) of the Covenant with respect to the author and his parents.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not replied to the author's allegations. In the circumstances, due weight must be given to his allegations to the extent that they have been sufficiently substantiated.¹

6.2 The Committee notes the claim of the author that his brother, Abdelmoteleb Abushaala, was arrested on 17 September 1995 in the car park of the Higher Institute of Civil Aviation by armed officers in plain clothes from the internal security forces. The arrest allegedly took place in the presence of many witnesses, including the director of the Institute. The Committee notes that the family has never received any confirmation of the place of detention of Abdelmoteleb Abushaala. It recalls that, in cases of enforced disappearance, the act of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, denies the person the protection of the law and places his or her life at a serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to show that it has met its obligation to protect Abdelmoteleb Abushaala's life. The Committee therefore concludes that the State party has failed in its

¹ See, inter alia, communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; communication No. 1208/2003, *Kourbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and communication No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

duty to protect Abdelmotaleb Abushaala's life, in violation of article 6, paragraph 1, of the Covenant.²

6.3 The Committee recognizes the suffering that being held indefinitely without contact with the outside world causes. It recalls its general comment No. 20 (1992),³ in which it recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Abdelmotaleb Abushaala was arrested on 17 September 1995 and that his fate remains unknown to this day. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with respect to Abdelmotaleb Abushaala.⁴

6.4 The Committee also takes note of the anguish and distress caused to the author and his parents by Abdelmotaleb Abushaala's disappearance. It considers that the facts before it disclose a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author and his parents.⁵

6.5 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Abdelmotaleb Abushaala was arrested on 17 September 1995 by armed officers in plain clothes from the internal security forces; that he was arrested without a warrant and without his being informed of the reasons for his arrest; that Abdelmotaleb Abushaala was neither informed of the charges against him nor brought before a judicial authority through which he would have been able to challenge the lawfulness of his detention; and that no official information was given to the author and his parents regarding the victim's place of detention or his fate. In the absence of a satisfactory explanation from the State party, the Committee finds that there has been a violation of article 9 with regard to Abdelmotaleb Abushaala.⁶

6.6 As to the claim under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Abdelmotaleb Abushaala's incommunicado detention, and in the absence of any information from the State party in that regard, the Committee finds that there has been a violation of article 10, paragraph 1, of the Covenant.⁷

6.7 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the

² See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.4; communication No. 1753/2008, *Guezout v. Algeria*, Views adopted on 19 July 2012, para. 8.4; and communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

³ See general comment No. 20 (1992), concerning the prohibition of torture and cruel treatment or punishment. *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.

⁴ See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.5, and communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

⁵ See communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.6; and communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5.

⁶ See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.7.

⁷ See, inter alia, communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law, if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.⁸ In the present case, the Committee notes that the State party has not furnished any information about the fate or whereabouts of the disappeared person, notwithstanding the many requests submitted to the State party by the author. The Committee concludes that the enforced disappearance of Abdelmotaleb Abushaala since 17 September 1995 has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

6.8 The author invokes article 2, paragraph 3, of the Covenant, under which States parties have an obligation to ensure an effective remedy for all persons whose Covenant rights have reportedly been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004),⁹ concerning the nature of the general legal obligation imposed on States parties, in which it states that the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the instant case, Abdelmotaleb Abushaala's parents submitted requests for visits to two prisons, sought the intervention of the people's committees of Tripoli, were informed by several lawyers that there was no relevant judicial procedure and eventually decided to request the intervention of the human rights foundation. However, all their efforts were to no avail and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother.

6.9 The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with regard to Abdelmotaleb Abushaala and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with respect to the author and his parents.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and article 16 of the Covenant with regard to Abdelmotaleb Abushaala, of article 7, read alone and in conjunction with article 2 (para. 3) and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with respect to the author and his parents.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his parents with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Abdelmotaleb Abushaala; (b) providing the author and his family with detailed information on the results of its investigation; (c) releasing him immediately, if he is still being detained incommunicado; (d) in the event that Abdelmotaleb Abushaala is deceased, handing over his remains to his parents; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and his parents for the violations suffered, as well as to Abdelmotaleb Abushaala, if he is still alive.

⁸ Communication No. 1905/2009, *Khirani v. Algeria*, para. 7.8; communication No. 1781/2008, *Berzig v. Algeria*, para. 8.8; and communication No. 1780/2008, *Zarzi v. Algeria*, para. 7.9.

⁹ See general comment No. 31 (2004), concerning the general legal obligation imposed on States parties. *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40, vol. I* (A/59/40 (Vol. I)), annex III.

The State party is also under an obligation to take steps to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**DD. Communication No. 1917/2009, *Prutina et al. v. Bosnia and Herzegovina*
 Communication No. 1918/2009, *Zlatarac et al. v. Bosnia and Herzegovina*
 Communication No. 1925/2009, *Kozica et al. v. Bosnia and Herzegovina*
 Communication No. 1953/2010, *Čekić et al. v. Bosnia and Herzegovina*
 (Views adopted on 28 March 2013, 107th session)***

<i>Submitted by:</i>	Fatima Prutina, Asmir Prutina, Hasib Prutina, Hasiba Zlatarac, Alma Čardaković, Mihra Kozica, Bajazit Kozica, Selima Kozica, Ema Čekić, Sanela Bašić, Sead Čekić and Samir Čekić (represented by counsel, Track Impunity Always – TRIAL)
<i>Alleged victims:</i>	The authors and their missing relatives, Fikret Prutina, Huso Zlatarac, Nedžad Zlatarac, Safet Kozica and Salih Čekić
<i>State party:</i>	Bosnia and Herzegovina
<i>Dates of communication:</i>	24 July 2009, 26 August 2009, 12 November 2009 and 3 December 2009 (initial submissions)
<i>Subject matter:</i>	Enforced disappearance and effective remedy
<i>Procedural issue:</i>	Insufficient substantiation
<i>Substantive issues:</i>	Right to life, prohibition of torture and other ill-treatment, liberty and security of person, right to be treated with humanity and dignity, recognition of legal personality, right to an effective remedy, and every child's right to such measures of protection as are required by their status as minor
<i>Articles of the Covenant:</i>	2 (3); 6; 7; 9; 10; 16; 24 (1)
<i>Article of the Optional Protocol:</i>	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2013,

Having concluded its consideration of Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010, submitted to the Human Rights Committee by Fatima Prutina,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir. Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The texts of two individual opinions by Committee members Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia are appended to the present Views.

Asmir Prutina, Hasib Prutina, Hasiba Zlatarac, Alma Čardaković, Mihra Kozica, Bajazit Kozica, Selima Kozica, Ema Čekić, Sanela Bašić, Sead Čekić and Samir Čekić under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communications are Fatima Prutina, Asmir Prutina, Hasib Prutina, Hasiba Zlatarac, Alma Čardaković, Mihra Kozica, Bajazit Kozica, Selima Kozica, Ema Čekić, Sanela Bašić, Sead Čekić and Samir Čekić, citizens of Bosnia and Herzegovina born in 1953, 1975, 1973, 1949, 1978, 1929, 1962, 1969, 1955, 1975, 1976 and 1978, respectively. The authors present their claims on their behalf and on behalf of their missing relatives, namely Fikret Prutina, born on 4 April 1950; Huso Zlatarac, born on 17 June 1939; Nedžad Zlatarc, born on 25 October 1971; Safet Kozica, born on 9 October 1965; and Salih Čekić, born on 4 March 1949. They claim that Bosnia and Herzegovina Bosnia and Herzegovina violated their relatives' rights under articles 6, 7, 9, 10 and 16, read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights. They also claim that Bosnia and Herzegovina Bosnia and Herzegovina violated their own rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant. Alma Čardaković and Samir Čekić further allege that the State party violated their right for special protection as minors until they reached their majority.¹ It is therefore alleged that article 7 and article 2, paragraph 3 were violated in their regard, in conjunction with article 24, paragraph 1 of the Covenant. The authors are represented by counsel, Track Impunity Always–TRIAL.²

1.2 On 28 March 2013, pursuant to rule 94, paragraph 2, of its rules of procedure, the Committee decided to join the present communications in view of their substantial factual and legal similarity.

Facts as presented by the authors

2.1 After its declaration of independence in March 1992, an armed conflict started in Bosnia and Herzegovina. The key local parties to the conflict were *Armija Republike Bosne i Hercegovine* (ARBiH; mostly made up of Bosniacs³ and loyal to the central authorities), *Vojska Republike Srpske* (VRS; mostly made up of Serbs) and *Hrvatsko vijeće obrane* (mostly made up of Croats).⁴

2.2 On 4 May 1992, the authors and their missing relatives were arrested in the village of Svake (Bosnia and Herzegovina) by members of the VRS. They were subsequently transferred to a concentration camp called Kasarna JNA in Semizovac, together with most of the inhabitants of their village. On 13 May 1992, the women and children, including the

¹ Alma Čardaković and Samir Čekić reached their majority on 4 March 1996 and 17 August 1996, respectively.

² The Optional Protocol entered into force for the State party on 1 June 1995.

³ Bosniacs were known as Muslims until the 1992–1995 war. The term “Bosniacs” (*Bošnjaci*) should not be confused with the term “Bosnians” (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

⁴ After the war, the ARBiH, the VRS and the *Hrvatsko vijeće obrane* gradually merged into the Armed Forces of Bosnia and Herzegovina.

authors, were allowed to leave the camp. On 16 May 1992, Fikret Prutina, Huso Zlatarac, Nedžad Zlatarc, Safet Kozica and Salih Čekić, along with all other men aged from 16 to 85, were taken to the concentration camp called Nakina Garaža. According to survivors, they were tortured, frequently beaten and forced to work without receiving any food for over 24 hours consecutively. On 24 May 1992, they were all taken to the Planjina Kuća concentration camp, where they were kept as prisoners. On 16 June 1992, eyewitnesses stated that the victims, along with other prisoners, were taken to an unknown destination by a member of the VRS, Dragan Damjanovic.⁵ This is the last time they were seen alive. Hasib Prutina, one of the authors, was kept in Planjina Kuća for another month, until a Serbian friend helped him get out and reach an area controlled by the ARBiH.

2.3 The authors learned that their relatives had been taken from Planjina Kuća to an unknown location through the local radio, which broadcasted the news based on the statements of an eyewitness to the events. The authors immediately reported the disappearance of their relatives to the local police of Visoko and to the International Committee of the Red Cross in Breza. They also reported the enforced disappearance of their relatives to the State Commission for Missing Persons in Sarajevo. In spite of the complaints promptly filed by the authors, no ex officio, prompt, thorough, independent and effective investigation was carried out.

2.4 The armed conflict came to an end in December 1995 when the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter “the Dayton Agreement”) entered into force.⁶

2.5 At the authors’ request, the competent court issued declarations of presumed death with respect to Fikret Prutina on 29 August 2002, Huso Zlatarac on 26 April 2002, Nedžad Zlatarac on 13 July 2006, Safet Kozica on 29 March 2010 and Salih Čekić on 17 May 2005. The authors received a pension and social assistance. However, they never considered this to be a form of compensation for the trauma caused and the loss of their relatives.

2.6 On 16 August 2005, the authors, together with other members of the Association of Families of Missing Persons from Vogošća, reported the kidnapping⁷ of their missing relatives to the Fifth Police Station in Vogošća. On 9 September 2005, they filed a criminal complaint with the Sarajevo Cantonal Prosecutor against unidentified members of the VRS in relation to the disappearance of their relatives. They did not receive any response from that Prosecutor until September 2011, when a statement was taken from one of the authors (Ema Čekić, see para. 7.2 below).

2.7 On 26 September 2005, the authors submitted an application to the Human Rights Commission of the Constitutional Court of Bosnia and Herzegovina, claiming a violation of articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the European Convention on Human Rights”) and of articles II.3(b) and (f) of the Constitution of Bosnia and Herzegovina. On 23 February 2006, the Constitutional Court found a violation of articles 3 and 8 of the European Convention on Human Rights and the corresponding constitutional provisions. According to the Constitutional Court, “the fact that even ten years after the end of the war activities in

⁵ With regard to Dragan Damjanovic’s fate, see the information in paragraph 2.10 below.

⁶ In accordance with the Dayton Agreement, Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Dayton Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard under the rules of the United Nations Commission on International Trade Law (UNCITRAL). The Brčko District, under the exclusive sovereignty of the State and international supervision, was formally inaugurated on 8 March 2000.

⁷ “Kidnapping” is the word used by the authors.

Bosnia and Herzegovina the authorities have not given to the applicants information about the destiny of their family members that went missing during the war activities in Bosnia and Herzegovina is enough to the Constitutional Court to make a conclusion that there has been a violation of the right not to be subjected to inhuman treatment from the article II.3.(b) of the Constitution of Bosnia and Herzegovina and article 3 of the European Convention, and the right to respect of private and family life and home from article 8 of the European Convention”.⁸

2.8 The Court ordered the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District to release all information in their possession pertaining to the fate or whereabouts of the authors’ missing relatives and to ensure that the State agencies envisaged by the Law on Missing Persons 2004⁹ (the Missing Persons Institute, the Central Records and the Fund for Support to the Families of Missing Persons) become operational. No compensation was awarded.

2.9 On 18 November 2006, the Constitutional Court held that its decision of 23 February 2006 had not been fully enforced. While the Republika Srpska had released all information in its possession, the other entity (the Federation of Bosnia and Herzegovina), the State and the Brčko District had not. Furthermore, the Missing Persons Institute, the Central Records and the Fund for Support to the Families of Missing Persons had not yet become operational. This decision was submitted to the State Prosecutor, as non-enforcement of the decisions of the Constitutional Court constitutes a criminal offence.

2.10 On 15 December 2006, the State Court of Bosnia and Herzegovina sentenced Dragan Damjanovic to 20 years of imprisonment for crimes against humanity. The indictment alleged that on several occasions he had gone to the Planjina Kuća camp and that, with the help of camp guards, he also reportedly used a large number of prisoners as human shields, resulting in serious injury and even in the death of some. However, he was not summoned or convicted for the torture and enforced disappearance of the authors’ missing relatives.¹⁰

2.11 The authors’ relatives are still missing and no ex officio, prompt and effective investigation has been carried out.

The complaint

3.1 The authors claim that the enforced disappearance of their missing relatives is in violation of articles 6, 7, 9, 10 and 16 read in conjunction with article 2, paragraph 3 of the Covenant.

3.2 The authors consider that the responsibility for shedding light on the fate of their missing relatives lies with the State party. They refer to an expert report of the Working Group on Enforced or Involuntary Disappearances (WGEID) which states that the primary responsibility for carrying out these tasks remains with the authorities under whose jurisdiction a suspected mass grave falls.¹¹ The authors further argue that the State party has an obligation to conduct a prompt, impartial, thorough and independent investigation of gross human rights violations, such as enforced disappearances, torture or arbitrary killings.

⁸ See Constitutional Court of Bosnia and Herzegovina, *Selimovic and others, Judgment of 23 February 2006*, para. 371.

⁹ *Official Gazette of Bosnia and Herzegovina*, No. 50/04 (9 November 2004).

¹⁰ See *Dragan Damjanovic, Judgment of 15 December 2006*, which became final on 13 June 2007.

¹¹ The authors refer to the report by Manfred Nowak, expert member of the WGEID, Special process on missing persons in the territory of the former Yugoslavia, document E/CN.4/1996/36, para. 78.

In general, it should be pointed out that the obligation to conduct an investigation also applies in cases of killings or other acts affecting the enjoyment of human rights that are not imputable to the State. In these cases, the obligation to investigate arises from the duty of the State to protect all individuals under its jurisdiction from acts committed by private persons or groups of persons which may impede the enjoyment of their human rights.¹²

3.3 With regard to article 6, the authors refer to the Committee's jurisprudence according to which a State party has a primary duty to take appropriate measures to protect the life of a person. In cases of enforced disappearances, the State party has an obligation to investigate and bring perpetrators to justice. By not doing so, the State party continues to violate the victims' right to life (see article 6 read in conjunction with article 2, paragraph 3, of the Covenant). The victims in the present case were illegally detained by State agents and have remained unaccounted for since 16 June 1992. Despite numerous efforts by the authors, no ex officio, prompt, impartial, thorough and independent investigation has been carried out and the victims' fate and whereabouts remain unknown.

3.4 The authors further submit that their missing relatives were illegally detained without charge by members of the VRS and that they were held indefinitely, without communication with the outside world, while repeatedly ill-treated and subjected to forced labour. Their enforced disappearance constitutes in itself a form of torture, on which no ex officio, prompt, impartial, thorough and independent investigation has yet been carried out by the State party in order to identify, prosecute, judge and sanction those responsible. This amounts to a violation of article 7 read in conjunction with article 2, paragraph 3 of the Covenant.

3.5 The victims were arrested on 4 May 1992 by members of the Serb army without an arrest warrant, nor was their detention recorded in any official register or proceedings brought before a court to challenge the lawfulness of their detention. As no explanation has been given by the State party and no efforts were made to clarify the fate of the victims, article 9 read in conjunction with article 2, paragraph 3, of the Covenant has been violated.

3.6 The victims were held in three different concentration camps and were subjected to torture, and inhuman and degrading treatment, including forced labour. The authors recall the Committee's jurisprudence, which has recognized that enforced disappearance itself constitutes a violation of article 10 of the Covenant.¹³ Since the torture and inhuman and degrading treatment the victims suffered in detention have never been investigated, the State party has violated article 10, read in conjunction with article 2, paragraph 3, of the Covenant.

3.7 The enforced disappearance places the victims outside the protection of the law, thus suspending the enjoyment of all other human rights of the disappeared person, who is confined in a condition of absolute defencelessness. The ceaseless efforts undertaken by the authors to shed light on the fate of their relatives have been impeded since their disappearance. The State party is therefore also allegedly responsible for a continuing violation of article 16 read in conjunction with article 2, paragraph 3 of the Covenant.

¹² The authors refer to Committee's General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties, para. 8; *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 172; and *Demiray v. Turkey*, Application no. 27308/95, Judgment of 21 November 2000, European Court of Human Rights, para. 50; *Tanrikulu v. Turkey*, Application no. 23763/94, Judgment of 8 July 1999, European Court of Human Rights, para. 103; and *Ergi v. Turkey*, Application no. 23818/94, Judgment of 28 July 1998, European Court of Human Rights, para. 82.

¹³ The authors refer to *Yasoda Sharma v. Nepal*, communication No. 1469/2006, Views adopted on 28 October 2008, para. 7.7.

3.8 The authors consider that the acute emotional distress caused by the disappearance of their relatives, the procedure to declare the victims dead and the continued uncertainty about their fate and whereabouts entails a separate violation of article 7 read in conjunction with article 2, paragraph 3, of the Covenant.

3.9 Finally, two of the authors, namely Alma Čardaković and Samir Čekić, submit that they were 14 years old and 13 years old respectively when they were detained, ill-treated and witnessed the enforced disappearance of their missing relatives. They have experienced the ongoing anguish of not knowing the truth of what happened to the victims. They never received any compensation for the harm suffered. It is therefore submitted that the State party has violated their rights under article 7 read in conjunction with article 2, paragraph 3, of the Covenant and, until March 1996 and August 1996 respectively, when they attained majority, that the State party has also violated the same rights in conjunction with article 24, paragraph 1, of the Covenant as these two authors were minors in need of special protection.

State party's observations on the merits

4.1 The State party submitted observations regarding Communications Nos. 1917/2009, 1918/2009 and 1925/2009 on 13 April 2010 and 27 April 2011. It submitted observations regarding Communication No. 1953/2010 on 12 April 2011, 21 June 2011 and 11 August 2011. These observations are overlapping to a large extent and may be summarized as follows.

4.2 As regards the general framework, the State party submits that a lot of effort has been made and a lot of success achieved in the quest to determine the whereabouts or fate of all missing persons. During the war, nearly 32,000 people went missing, of which more than 21,000 have already been identified. The Missing Persons Institute and, within that Institute, the Central Records, have been set up pursuant to the Law on Missing Persons 2004; the third State agency envisaged by that Law, the Fund for Support to the Families of Missing Persons, has not yet been established. Furthermore, the criminal legislation has been amended and war crimes chambers have been set up within the State Court with the aim of dealing more efficiently with enforced disappearances and other war crimes cases. In view of the large number of war crime cases (more than 1,700 cases against more than 9,000 suspects), the National War Crimes Strategy was adopted in 2008, one of its objectives being to process priority cases by the end of 2015 and other war crimes cases by the end of 2023.

4.3 As regards the authors' situation, the State party submits that VRS soldiers took the authors' missing relatives and 23 other persons from the Planjina Kuća internment camp to an unknown location on or about 16 June 1992. From that group, the bodies of two persons were found in the Bosna River during the war. They were first buried in unmarked graves in Visoko and Zenica, and then subsequently exhumed and identified as the bodies of the late Enes Alić and Rešad Dević. In view of the fact that a number of other bodies were found in the Bosna River and were interred in unmarked graves in Visoko and Zenica during the war, the authorities requested the International Commission on Missing Persons¹⁴ to carry out a "target identification" (that is, to compare the DNA samples from all such bodies with the DNA samples of the relatives of the remaining 26 missing

¹⁴ The International Commission on Missing Persons was established at the initiative of United States President Clinton in 1996. It is currently headquartered in Sarajevo. In addition to its work in the former Yugoslavia, the Commission is now actively involved in helping Governments and other institutions in various parts of the world address social and political issues related to missing persons and establish effective identification systems in the wake of conflict or natural disaster.

persons). However, there was no match for any of those 26 persons. The State party also submits that 99 individual, collective and mass graves with remains of 155 missing persons have been discovered in the municipality of Vogošća and the adjacent municipality of Centar; 132 of them have been identified. The DNA samples from the remaining 23 unidentified bodies have been compared with the authors' DNA samples, again to no avail. It would appear from the documents submitted by the State party that the Association of the Families of Missing Persons from the Municipality of Vogošća, headed by one of the authors, has been in contact with the Missing Persons Institute on a regular basis. It would further appear that a memorial for all missing persons from the municipality of Vogošća, including the authors' missing relatives, has been erected and that the day of their disappearance is commemorated every year.

Authors' comments on the State party's observations

5.1 The authors of Communications No. 1917/2009, 1918/2009 and 1925/2009 submitted their comments on 8 July 2010 and 23 May 2011. As for the authors of Communication No. 1953/2010, they submitted their comments on 23 May 2011, 24 August 2011 and 13 September 2011. Those comments are overlapping to a large extent and may be summarized as follows.

5.2 The authors reiterate that the responsibility to clarify the fate of the missing persons lies with the State party. With regard to the State party's submission that to date, conditions for beginning the work of the Fund for Support to the Families of Missing Persons have not yet been created or do not conform the text of the Agreement (see para. 4.2 above), the authors' response is that the Constitutional Court of Bosnia and Herzegovina delivered a number of decisions concerning cases of relatives of missing persons, including the authors, whereby it found a violation of articles 3 and 8 of the European Convention on Human Rights because of the lack of information about the destiny of their missing loved ones. In the mentioned decisions, the Constitutional Court did not pronounce on the issue of compensation, as it considered the latter to be covered by the provisions of the Law on Missing Persons. Unfortunately, as confirmed by the State party, to date the provisions referred to above remain a dead letter and, consequently, the Constitutional Court's rulings remain unimplemented. In any event, the establishment of the Fund will not replace appropriate compensation as, in the authors' opinion, the Fund has been conceived to be a measure of social welfare which is different from compensation for human rights violations. The authors add that reparations are not only financial in nature but include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should take into account the gender perspective, considering that most relatives of missing persons are women.

5.3 In its rulings, the Constitutional Court ordered that all accessible and available information on missing relatives be transmitted to the authors no later than 30 days from the date of receipt of the rulings. At the time of the authors' comments, this information had not yet been provided. The authors consider that those responsible for not implementing the rulings of the Constitutional Court should be prosecuted in conformity with the law of Bosnia and Herzegovina.¹⁵

5.4 One of the authors of Communication No. 1925/2009, Mirha Kozica, adds that on 29 March 2010, she obtained from the Municipal Court of Sarajevo a decision declaring her son dead. Being over 80 years old and in a precarious situation, she explains that she was forced to obtain such a decision in order to maintain her monthly pension. The date of death was fixed randomly and contradicts testimonies of the eyewitnesses who had last seen her

¹⁵ The authors quote the WGEID press release of 21 June 2010 on the visit to Bosnia and Herzegovina.

son alive. In spite of the fact that the date of death was randomly set, the authors of Communication No. 1925/2009 still do not know with certainty that their missing relative is dead and consider the death certificate to be an extreme psychological burden. The authors recall the Committee's view that obliging families of disappeared persons to have the family member declared dead in order to be eligible for compensation raises issues under articles 2, 6 and 7 of the Covenant.¹⁶

5.5 The authors note the State party's submission that target identification was requested from the International Commission on Missing Persons in the areas where mortal remains could be found and potential identification could be carried out. They stress, however, that so far, they have not been contacted by the personnel of the Regional Office of Istočno Sarajevo and the Field Office in Sarajevo. The authors are convinced that they would be in a position to provide the Commission with information that may be useful to determining the location of the missing persons. Moreover, to their knowledge, none of the eyewitnesses who last saw the missing relatives alive have been heard by the relevant authorities. The authors further note that it is with the State party's observations to the Committee that they have learnt that missing persons who could potentially include their relatives could indeed be located in the areas mentioned (see para. 4.3 above). They consider that this information should have been provided to them directly and promptly.

5.6 In the specific case of Communication No. 1953/2010, the authors contend that six years after their filing of the original complaint for enforced disappearance with the police, the authors had still received no feedback on whether an investigation was being carried out and whether their case had been given a specific number. However, on 29 April 2011, Ema Čekić received a reply from the Cantonal Prosecutor's Office stating that, after conducting necessary verifications, a case had been filed against Radosavljević Drago *et al.* for war crimes against civilians in accordance with article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia. On 1 March 2011, a prosecutor was assigned to this case. While welcoming such developments, the authors raised some concerns at the fact that the prosecutor intends to prosecute the alleged suspects under the Criminal Code of the Socialist Federal Republic of Yugoslavia and not the 2003 Criminal Code of Bosnia and Herzegovina.¹⁷ The authors note that this important piece of information had not been transmitted by the State party in its observations on admissibility and merits. Without taking the initiative to seek information from the authorities directly, the authors would have been remained ignorant of the developments in the investigations.

Further submissions from the State party

6.1 On 17 August (regarding Communications No. 1917/2009, 1918/2009 and 1925/2009) and on 19 August 2011 and 12 September 2011 (regarding Communication No. 1953/2010), in reply to the authors' comments, the State party provided further information related to the criminal investigations under way. It stated that the Prosecutor's Office of Bosnia and Herzegovina (the Special Department for War Crimes) is conducting an investigation on a number of persons accused of taking part in planning and organizing the enforced relocation of thousands of non-Serb civilians; forming, organizing and operating camps and prisons in the territory of municipalities of Hadžići, Vogošća and Ilidža in which they imprisoned non-Serb civilians; directly taking part in the interrogation of detainees; deciding on the length of their captivity; and categorizing the detained civilians, thereby deciding their fate.

¹⁶ The authors refer to the Committee's concluding observations on Algeria, CCPR/C/DZA/CO/3, 12 December 2007, para. 13.

¹⁷ The authors do not elaborate further on this issue.

6.2 The suspects, as former managers and responsible personnel in correctional institutions on the territory of Republika Srpska under the direct command of the Minister of Justice, are charged with killing, torturing, and inflicting mental abuse, forced labour and enforced disappearance of non-Serb civilians who were arbitrarily kept in the institutions mentioned during the period of April to December 1992. In the period between 1992 and 1994, during the conflict between the Army of Republika Srpska and the army of Bosnia and Herzegovina, Serbian police and paramilitary forces launched attacks against non-Serb civilians and committed serious human rights violations.

6.3 The State party contends that the Prosecutor's Office of Bosnia and Herzegovina is currently taking the necessary investigative actions, including steps to locate the whereabouts of mortal remains of the missing persons, hearing witnesses, collecting physical evidence and determining facts that will prove the crimes and criminal liability of suspects. The enforced disappearance of all of the authors' relatives is in the stage of "active investigation" and has been registered under the numbers KTRZ 55/06 and KTRZ 42/05. Their cases are considered a high priority under the National War Crimes Strategy and should accordingly be concluded by the end of 2015.

6.4 In reply to the authors' contention regarding the hearing of witnesses, the State party notes that these witnesses have been heard by the police but unfortunately, not a single witness who was at that time confined in the Planjina Kuća camp had any knowledge about the fate of the inmates, including the authors' relatives, once the latter were brought to an unknown location.

6.5 As for the alleged perpetrators, the State party contends that among the suspects, some such as the guards and camp administrators have not yet been located by the prosecution. As for the high-ranking commanders, the Missing Persons Institute has not made any contacts with them as the task of arresting and interrogating war criminals is not a responsibility of those offices but of other state agencies and institutions.

6.6 The State party further contends that the families of all missing persons in Bosnia and Herzegovina, through the media or personal contact with the investigators and the management of the Missing Persons Institute, are able to obtain information relating to the fate of their relatives. The State party is in direct contact with the Associations of the Families of Missing Persons from the Municipality of Vogošća and the cooperation between this organization and the authorities is high and constant.

Further comments from the authors

7.1 On 9 September 2011 (regarding Communications Nos. 1917/2009, 1918/2009 and 1925/2009), the authors reiterated their previous comments on the State party's obligation to investigate and added that one of the persons running the concentration camp in Vogošća at the time, Branki Vlaco, had been arrested in Montenegro and should be extradited to Bosnia and Herzegovina. It is the authors' view that he could greatly contribute to the investigation and thereby clarify the fate and whereabouts of the authors' relatives. This information could also be useful for the Missing Persons Institute in establishing the potential location of the mortal remains of those who went missing in Vogošća.

7.2 On 12 October 2011, the authors of Communication No. 1953/2010 expressed their appreciation for the fact that at the beginning of September 2011, Ema Čekić had been invited to meet with the Cantonal Prosecutor in order to give a statement on the events which occurred in Vogošća in June 1992. On 15 September 2011, she gave a statement indicating the details of the event and the identity of potential witnesses. The authors are persuaded that the prosecutor taking such a step is intimately linked to the authors' submission of their complaint to the Committee. While this should be considered a positive development, it is only the first step of a long-standing procedure involving the framing of

charges, arrest, judgement and potential sentencing of those responsible. In view of the fact that the events took place more than 19 years ago,¹⁸ the requirements of promptness and thoroughness of the investigation of gross human rights violations have not been met by the State party.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether the case is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and that the authors have exhausted all available domestic remedies.

8.3 The Committee notes that the State party has not challenged the admissibility of the communications and that the authors' allegations have been sufficiently substantiated for the purposes of admissibility. All admissibility criteria having been met, the Committee declares the communications admissible and proceeds to their examination on the merits.

Consideration of merits

9.1 The Committee has considered the case in the light of all information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2 The authors, in the present communications, claim that their relatives have been victims of enforced disappearance since their illegal arrest on 16 June 1992 and that, despite their numerous efforts, no prompt, impartial, thorough and independent investigation has been carried out to clarify the victims' fate and whereabouts and to bring the perpetrators to justice. In this respect, the Committee recalls its General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which a failure by a State party to investigate allegations of violations and a failure by a State party to bring to justice perpetrators of certain violations (notably, torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killings and enforced disappearances) could in and of itself give rise to a separate breach of the Covenant.

9.3 The authors do not allege that the State party is directly responsible for the enforced disappearance of their relatives.

9.4 The Committee takes note of the State party's contention that it has made considerable efforts at the general level and in this particular case in order to establish the fate or whereabouts of the authors' missing relatives and to bring those responsible to justice. Notably, a domestic tribunal has established that authorities are responsible for the disappearance of the authors' relatives (see para. 2.7 above); domestic mechanisms have been set up to deal professionally, efficiently and without discrimination with enforced disappearances and other war crimes cases (see para. 4.2 above); DNA samples from a number of unidentified bodies have been compared with the authors' DNA samples; a criminal investigation into the disappearance of the authors' relatives has been opened; a memorial for all missing persons from the municipality of Vogošća, including the authors'

¹⁸ Almost 21 years at the time of adoption of the current Views.

missing relatives, has been erected; and the day of their disappearance is commemorated every year (see para. 4.3 above).

9.5 The Committee considers that the obligation to investigate allegations of enforced disappearances and to bring the culprits to justice is not an obligation of result, but of means, and that it must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.¹⁹ Therefore, while acknowledging the gravity of the disappearances and the suffering of the authors because the fate or whereabouts of their missing relatives has not yet been clarified and the culprits have not yet been brought to justice, this in itself is not sufficient to find a breach of article 2, paragraph 3 of the Covenant in the particular circumstances of this communication.

9.6 That being said, the authors also claim that they have learned about certain important steps taken by the authorities in their case, such as the fact that target identification of mortal remains was carried out in locations belonging to Vogošća and neighbouring municipalities, only during the proceedings before the Committee (see paras. 4.3 and 5.5 above). The State party does not refute that claim. The Committee considers that information on the investigation of enforced disappearances must be made promptly accessible to the families. The Committee further notes that the social allowance provided to the authors depends upon their acceptance to recognize their missing relatives as dead. The Committee considers that for a State which is investigating disappearances conducted on its territory to oblige families of disappeared persons to have the family member declared dead in order to be eligible for compensation, while the investigation is ongoing, is a breach of article 2, paragraph 3, read in conjunction with articles 6, 7 and 9 in that it makes the availability of compensation dependent on the family's willingness to have the family member declared dead.

9.7 On all those grounds, the Committee finds a breach of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, 7 and 9 with regard to the authors and their disappeared relatives.

9.8 The Committee further notes the additional allegations submitted by Alma Čardaković and Samir Čekić, who in 1992 were minors aged 14 years old and 13 years old respectively when they were detained and ill-treated and witnessed the enforced disappearance of their missing relatives. The Committee notes that the State party has not contradicted those allegations. The Committee recalls in this regard its General Comment No. 17 (1989), according to which the implementation of article 24 entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. In the present case, the State party has not taken the two authors' status as minors into account to offer them special protection. The Committee therefore finds that the State party has also violated the rights of Alma Čardaković and Samir Čekić under article 24, paragraph 1, of the Covenant as minors in need of special protection.

¹⁹ See WGEID, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 5. The relevant part of that paragraph reads as follows: "There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person." See also, *Palić v. Bosnia and Herzegovina*, Judgement of 15 February 2011, Application No. 4704/04, European Court of Human Rights, paras. 65 and 70.

9.9 In the light of the above findings, the Committee will not examine separately the authors' allegations under article 2, paragraph 3, read in conjunction with articles 10 and 16 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Bosnia and Herzegovina of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, 7 and 9 of the Covenant with regard to all of the authors and their disappeared relatives; and also a violation of article 24, paragraph 1 of the Covenant with regard to Alma Čardaković and Samir Čekić.

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including (a) continuing its efforts to establish the fate or whereabouts of their relatives, as required by the Law on Missing Persons 2004; (b) continuing its efforts to bring to justice those responsible for their disappearance and to do so by the end of 2015, as required by the National War Crimes Strategy; (c) abolishing the obligation for family members to declare their missing relatives dead to benefit from social allowances or any other forms of compensation; (d) and ensuring adequate compensation. The State party is also under an obligation to prevent similar violations in the future and must ensure, in particular, that investigations into allegations of enforced disappearances are accessible to the missing persons' families.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in all three official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee member Fabián Salvioli (partly dissenting)

1. I generally concur with the Committee's decision in the case of *Prutina et al. v. Bosnia and Herzegovina* (Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010), although I regret to say that I disagree with the considerations set forth in paragraphs 9.5 and 9.6 of the Committee's Views and the legal consequences thereof. I must therefore clearly state my position in respect of two basic issues: first, the legal nature of the obligation to investigate enforced disappearance and second, the Committee's assessment of the evidence which led it to its conclusions, since in the present case the Committee ought to have found that there had been an independent violation of article 7 of the International Covenant on Civil and Political Rights.

I. The legal nature of the obligation to investigate enforced disappearances

2. In the joint dissenting opinion delivered in the case of *Cifuentes Elgueta v. Chile* (Communication No. 1536/2006), I explained my view with regard to the scope of the obligations relating to enforced disappearance, the latter's legal treatment in the International Covenant on Civil and Political Rights, the nature of the obligation under article 2.3 of the Covenant — which entails obligations of means and result for the States parties — and the approach to the right to truth as part of the progressive development of the protection of human rights. I refer to these arguments to avoid repeating them.^a

3. When a person is subjected to enforced disappearance, his or her family suffers particular anguish on account of the uncertainty of what has happened to that person. This particular situation (regardless of other factors) ends only once the fate and whereabouts of the disappeared person are known. Thus, while the duty to investigate human rights violations and to bring their perpetrators to justice is an obligation of means, in the case of enforced disappearance the State has a duty towards the victim's family members to fully establish his or her whereabouts (or those of his or her mortal remains if the person has died); to put it more plainly, *there is an obligation of result in such cases*, otherwise the cruel and inhuman treatment of the disappeared person's family continues and, for this reason, the family also becomes a victim of a breach of article 7 of the International Covenant on Civil and Political Rights.^b

^a Human Rights Committee, *Cifuentes Elgueta v. Chile*, communication No. 1536/2006, decision of 28 July 2009, individual opinion of Committee members Helen Keller and Fabián Salvioli (dissenting), para. 31.

^b On the prohibition of torture and cruel, inhuman or degrading treatment.

II. Failure to find an independent violation of article 7 of the Covenant in the case of *Prutina et al. v. Bosnia and Herzegovina*: inappropriate application by the Human Rights Committee of criteria for assessing evidence

4. In the present case, it has been shown that Mihra Kozica was obliged to request a death certificate for her disappeared son in order to maintain her monthly pension. The author alleges that this represents an extreme psychological burden for her.^c The State has not refuted these facts in any of its submissions; therefore, the Committee has deemed them valid.

5. From a legal standpoint, the Committee found a breach of article 2, paragraph 3, read in conjunction with articles 6, 7 and 9. In other words, the Committee concluded that there had been a violation of the right to obtain reparation for human rights violations.

6. In fact, however, there is a more flagrant and obvious violation: the requirement by the State that the relative of a disappeared person must apply for a death certificate in order to obtain a benefit or compensation has an unacceptable consequence, in that *it obliges that person to recognize the death of his or her relative, even though that person's fate is uncertain*. This constitutes cruel and inhuman treatment within the meaning of article 7 of the International Covenant on Civil and Political Rights.

7. It is unclear why the Committee failed to comment on the issue, even though the petitioner's allegations were fully substantiated and not refuted by the State. There is no logical answer to this question.

8. The Human Rights Committee is not a civil law body that rules on the legal claims presented by the parties. International human rights bodies must reach a decision and apply the provisions of the corresponding instrument solely on the basis of the *proven facts* in the communication (in this case, the Committee must interpret and apply the provisions of the International Covenant on Civil and Political Rights).

9. The authors describe the facts and the State has the possibility to refute them and to draw attention to other facts. Once the facts have been proven, the parties' legal approaches are merely indicative and cannot restrict or condition the work of the Human Rights Committee.

10. Its present vague and imprecise manner of proceeding results in incongruous decisions, such as in the instant case of *Prutina et al. v. Bosnia and Herzegovina*, in which the Committee has not been able to pinpoint the direct violation of article 7, to the detriment of the authors.

11. Ever since I joined the Committee, I have maintained that it has inexplicably restricted its own competence to find a violation of the Covenant in the absence of a specific legal claim by the parties. Whenever the facts disclosed by the parties clearly establish such a violation, the Committee can and must — by virtue of the principle of *iura novit curia* — document the violation in proper legal form. The legal basis for this position and the reason why neither the States nor the complainant will be left without a defence may be found in my partially dissenting opinion in the case of *Anura Weerawansa v. Sri Lanka*, to which I refer in order to avoid repeating.^d

^c See paragraph 5.4 of the Views of the Committee in this case.

^d Human Rights Committee, *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005, Views of 17 March 2009, individual opinion by Committee member Mr. Fabián Salvioli (partially dissenting), paras. 3–5.

12. Human rights bodies constantly apply the principle of *iura novit curia*, as do international courts such as the European Court of Human Rights^e and the Inter-American Court of Human Rights,^f and this is also standard practice in quasi-judicial human rights bodies (the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the former European Commission of Human Rights).

13. The Human Rights Committee has itself on occasion applied this principle, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant, on the basis of the evidence, rather than on that of legal arguments or the specific articles cited by the parties.^g

14. Unfortunately, the Committee did not do so in the present case of *Prutina et al. v. Bosnia and Herzegovina*. Non-application of the principle of *iura novit curia* produced unreasonable results. By inexplicably restricting its own competence, the Committee failed to conclude that there had been an independent violation of article 7 of the Covenant, based on proven facts as adduced by the petitioner and not refuted by the State.

15. In its Views on the case of *Prutina et al. v. Bosnia and Herzegovina*, the Committee should have stated that *the requirement by the State that the relative of a disappeared person must apply for a death certificate in order to obtain a benefit or compensation constitutes inhuman and cruel treatment*. By virtue of this proven fact, there is a violation of article 7 of the International Covenant on Civil and Political Rights.

16. I hope that, in the near future, the Human Rights Committee will be able to discuss the criteria governing the application of the law on individual communications, to ensure that each established violation receives the legal treatment which the victims deserve, which would be more consistent with the object and purpose of the International Covenant on Civil and Political Rights.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

^e See, for example, *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Application no. 5493/72, European Court of Human Rights, Series A, No. 24, para. 41.

^f *Godínez Cruz case*, Judgment of 20 January 1989, Inter-American Court of Human Rights, Series C, No. 5, para. 172.

^g See the following Views of the Human Rights Committee: *Anna Koreba v. Belarus*, communication No. 1390/2005, Views of 25 October 2010; *Olimzhon Eshonov v. Uzbekistan*, communication No. 1225/2003, Views of 22 July 2010, para. 8.3; *R.M. and S.I. v. Uzbekistan*, communication No. 1206/2003, Views of 10 March 2010, paras. 6.3 and 9.2 (finding of non-violation); *Munguwambuto Kabwe Mwamba v. Zambia*, communication No. 1520/2006, Views of 10 March 2010; *Mariano Pimentel et al. v. Philippines*, communication No. 1320/2004, Views of 19 March 2007, paras. 3 and 8.3; *Willy Wenga Ilombe and Shandwe v. Democratic Republic of the Congo*, communication No. 1177/2003, Views of 17 March 2006, paras 5.5, 6.5 and 9; *Validzhon Khalilova v. Tajikistan*, communication No. 973/2001, Views of 30 March 2005, para. 3.7; and *Davlatbibi Shukurova v. Tajikistan*, communication No. 1044/2002, Views of 17 March 2006, para. 3.

Individual opinion by Committee member Victor Rodríguez-Rescia (partly dissenting)

1. The present opinion concurs with the decision of the Human Rights Committee concerning Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010 in respect of the violation of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, 7 and 9 of the Covenant, with regard to the authors of these communications, for failure to investigate and make reparation following the enforced disappearance of their relatives.

2. However, taking as proven the facts of the Communications regarding the missing persons' families being obliged to produce a death certificate for their relative in order to be eligible for compensation or social allowances (paras. 5.4 and 9.6), I believe that the Committee should also have established a separate violation of article 7 with regard to the authors, in view of the moral and psychological repercussions they suffered at the hands of the State when it obliged them to declare their missing relatives dead in order to claim compensation (monthly pensions). This enforced certification of death amounts to an additional psychological burden and institutional revictimization, as is clearly and painfully illustrated in the description of the facts in paragraph 5.4, in which the author, Mihra Kozica, was obliged by reason of her advanced age to go through this procedure in order to keep her monthly pension, even though the presumed date of death given on her son's death certificate was random and incongruous.

3. It is difficult to understand why, even though these points were raised by the authors — and, what is more, were not contested by the State — the Committee systematically restricts its mandate to find violations of the Covenant, when the authors do not invoke or mention a specific article of the Covenant or — and this is worse — even where the authors do so, as here, but in conjunction with other articles of the Covenant and not separately. In accordance with the principle of *iura novit curia*, the Committee should have followed the normal practice of determining the law to be applied to the undisputed facts of the communication, following the legal adage, “the court knows the law” or “tell me the facts and I will tell you the law”.

4. In the very first communication I considered as a member of this Committee, (*Olechkevitch v. Belarus*, Communication No. 1785/2008), I noted with concern that the principle of *iura novit curia* was not applied by this international treaty body, and I endorsed a concurring opinion along with Fabián Salvioli and Yuval Shany. In that case, the author had not expressly alleged a violation of other Covenant rights, yet in my opinion, a violation of those rights should have been found. My concern is even greater in the present case because the authors did in fact claim a violation of article 7 but, because they did not invoke it independently of other rights, the Committee failed not only to establish a separate violation of article 7 but also to award reparation for the effect on the authors of being obliged to declare their relatives dead in an ongoing situation of enforced disappearance. The removal of the obligation on relatives to obtain a death certificate for their missing relatives in order to receive social allowances or other forms of compensation is not sufficient to redress the moral injury caused by being forced to declare their relatives dead, which, in my opinion, amounted to cruel and inhuman treatment, that is to say a violation of their psychological integrity and therefore a separate violation of article 7 of the Covenant.

5. The Committee should have applied the principle of *iura novit curia* to the Communications concerning Prutina, Zlatarac *et al.* Moreover, the Committee should, in the future, consider applying it as a normal part of its interpretative practice. Not to do so would mean that the authors of an individual communication, whether represented or —

even worse — not represented by counsel, would be required to become experts in the application and interpretation of international human rights law, which would place a burden upon authors that is neither required nor justified by the Covenant. The non-application of the principle of *iura novit curia* could be justified in civil courts, where judges cannot decide *infra petita* or *ultra petita*, but not in human rights treaty bodies, be they national or international, where the discussion of human right violations always favours the individual (the principle of *pro homine*) (Covenant, art. 5). The determination by the decision-making body must rest on the reported and proven facts, not on the arguments of the parties, namely the authors and the respondent State, which may be correct or incorrect, precise or imprecise, or argued in different ways.

6. To oblige the authors of a communication to specify each and every one of the articles of the Covenant they consider to have been violated is to place upon them a burden of argument that is incompatible with their status as victims and petitioners, whether or not they have legal representation. The authors' main obligation is to prove the facts put forward as grounds for the admissibility of the communication, and it is on that basis that the State will exercise its right to a defence — a right that can never be impaired as long as those facts are transmitted to it when it is first notified of the communication. In this way, the respondent State can never be taken by surprise provided that the case is based on facts that have been reported and thoroughly discussed.

7. The principle of *iura novit curia* implies more than an academic exercise in which the Committee considers whether the complainant has shown the legal precision and learning needed to understand how international human rights law applies to their human tragedy — that tragedy being to have suffered human rights violations at the hands of a State that itself ought to have a proper understanding of human rights safeguards for all its people. The procedural obligations of authors are by no means comparable with those of the State in an international case of human rights violations.

8. In the communication under consideration, the facts and claims presented by one of the authors could not be clearer. She states that “she was forced to obtain such decision in order to maintain her monthly pension. The date of death was fixed randomly and contradicts testimonies of eye witnesses who have last seen her son alive.” This should have been sufficient for the Committee to find a violation of article 7 of the Covenant with regard to the author, and thus expand reparations to ensure comprehensive redress for the injury caused by being obliged to make a declaration that is incompatible with the search for relatives or, if they are not found alive, for their remains. The requirement to declare their missing relatives dead in order to obtain compensation for enforced disappearances is a further indignity, on top of the ineffectiveness of the remedies available for investigation of the facts, and constitutes institutional revictimization. By virtue of this fact, then — stated, proven and not refuted by the State party — the Committee should have found a separate violation of article 7 of the Covenant, over and above the violations established in relation to other articles, but on the basis of the facts relating to the failure to investigate and the absence of guarantees of an effective judicial remedy (Covenant, art. 2, para. 3).

Decision on the merits

9. Consequently, the relevant part of paragraph 9.6 of the Committee's Views should have read: “In the light of the foregoing, the Committee, in accordance with article 5, paragraph 4, of the Optional Protocol to the Covenant, considers that the obligation imposed by the State on the relatives to produce a death certificate for their relative in order to receive the corresponding compensation, while the investigation is still ongoing, is a violation of article 7 of the Covenant.”

Full reparation and the obligation to prevent repetition

10. Given the additional impact on the authors of revictimization, insofar as they were formally obliged to declare their missing relatives dead in order to receive compensation for the consequences of the failure to investigate their disappearance, paragraph 11 of the Committee's Views should have been broadened to have an *erga omnes* effect, and the State should have been urged to do away with declarations of this kind, not only in respect of the authors of this communication, but also for the relatives of other missing persons in similar cases of enforced disappearance, as a guarantee that it will not happen again.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**EE. Communication No. 1932/2010, *Fedotova v. Russian Federation*
(Views adopted on 31 October 2012, 106th session)***

<i>Submitted by:</i>	Irina Fedotova (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	10 February 2010 (initial submission)
<i>Subject matter:</i>	Bringing the author to administrative responsibility for “public actions aimed at propaganda of homosexuality among minors”
<i>Procedural issues:</i>	Abuse of the right of submission; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to impart information and ideas; permissible restrictions; right to the equal protection of the law without any discrimination
<i>Articles of the Covenant:</i>	19; 26
<i>Articles of the Optional Protocol:</i>	3; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2012,

Having concluded its consideration of communication No. 1932/2010, submitted to the Human Rights Committee by Irina Fedotova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Irina Fedotova, a Russian national born in 1978. She claims to be a victim of a violation by the Russian Federation of her rights under article 19 and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. Pursuant to rule 90 of the Committee’s rules of procedure, Committee member Sir Nigel Rodley did not participate in the adoption of the present decision.

1.2 On 20 May 2010, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 13 August 2010, the Chairperson decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

The facts as presented by the author

2.1 The author is an openly lesbian woman and an activist in the field of lesbian, gay, bisexual and transgender (LGBT) rights in the Russian Federation. In 2009 she, together with other individuals, tried to hold a peaceful assembly in Moscow (so called "Gay Pride"), which was banned by the Moscow authorities. A similar initiative to hold a march and a "picket" to promote tolerance towards gays and lesbians was banned in the city of Ryazan in 2009.

2.2 On 30 March 2009, the author displayed posters that declared "Homosexuality is normal"¹ and "I am proud of my homosexuality"² near a secondary school building in Ryazan. According to her, the purpose of this action was to promote tolerance towards gay and lesbian individuals in the Russian Federation.

2.3 The author's action was interrupted by police and, on 6 April 2009, she was convicted by the Justice of the Peace of an administrative offence under section 3.10 of the Ryazan Region Law on Administrative Offences of 4 December 2008 (Ryazan Region Law) for having displayed the posters in question. This provision reads in relevant part: "Public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors shall be punished with administrative fine of between one thousand five hundred and two thousand roubles".³ The author was ordered to pay a fine of 1,500 Russian roubles.⁴

2.4 On an unspecified date, the author appealed the ruling of the Justice of the Peace to the Oktyabrsky District Court of Ryazan (Oktyabrsky District Court). In her appeal, she asked the Oktyabrsky District Court to revoke the ruling and to request the Constitutional Court to assess the compatibility of section 3.10 of the Ryazan Region Law with articles 19, 29 and 55, part 3, of the Constitution of the Russian Federation of 12 December 1993 (Constitution). She also asked to suspend proceedings in her case, pending the ruling of the Constitutional Court on the matter.

2.5 In her appeal to the Oktyabrsky District Court the author stated that she did not dispute the facts but considered that the ruling of the Justice of the Peace was based on a provision of law that was contrary to articles 19 and 29 of the Constitution that, respectively, prohibit discrimination on the ground of social status and guarantee the right to freedom of thought and expression. She further submitted that it was unclear from the wording of section 3.10 of the Ryazan Region Law what was meant with "propaganda of homosexuality", because from the constitutional point of view "propaganda" was an essential component of the exercise of the right to freedom of expression. Therefore, the author added, she had a right to promote certain points of view in relation to homosexuality. She argued that section 3.10 of the Ryazan Region Law unreasonably discriminated against

¹ The original text in Russian reads as follows: "Гомосексуализм – это нормально".

² The original text in Russian reads as follows: "Я горжусь своей гомосексуальностью".

³ The original text in Russian reads as follows: "Публичные действия, направленные на пропаганду гомосексуализма (мужеложства и лесбиянства) среди несовершеннолетних, - влекут наложение административного штрафа на граждан в размере от одной тысячи пятисот до двух тысяч рублей".

⁴ Approximately US\$ 44.9/33.6 euros.

individuals with “non-standard sexual orientation” by prohibiting any dissemination of information about them. The author submitted that, by displaying posters, she acted on the basis of article 29 of the Constitution with the aim of promoting tolerance towards homosexuality among minors and the idea that homosexuality was “normal” from the point of view of medical science. Finally, she argued that section 3.10 of the Ryazan Region Law established restrictions on the exercise of her right to freedom of expression, although under article 55, paragraph 3, of the Constitution, this right could be restricted only by federal law.

2.6 On 14 May 2009, the ruling of the Justice of the Peace was upheld by the Federal Judge of the Oktyabrsky District Court. The Court determined that, under article 55 of the Constitution, individual rights and freedoms, including those guaranteed under articles 19 and 29 of the Constitution, could be restricted by federal law and only to the extent necessary for the protection of the foundations of the constitutional order, public morals, health, or the rights and lawful interests of other persons, or for ensuring the State defence and national security. It added that the Code on Administrative Offences of the Russian Federation was in fact such a federal law and that, according to article 1.1 of the said Code, the law on administrative offences consisted of the present Code and laws on administrative offences adopted in compliance with it by the entities of the Russian Federation. The Court stated that the Ryazan Region Law was based on the Constitution and the Code on Administrative Offences, thus it was a part of the law on administrative offences. It concluded that section 3.10 of the Ryazan Region Law was not contrary to the Constitution and that it established restrictions (administrative liability) on the right to freedom of expression, including freedom to impart information, that were aimed at protecting morals, health, rights and legitimate interests of minors.

2.7 The author submits that she has exhausted all available and effective domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author submits that the ruling of the Justice of the Peace of 6 April 2009 interfered with her right to freedom of expression guaranteed under article 19 of the Covenant, because she was banned from disseminating ideas of a tolerant attitude towards sexual minorities and convicted of an administrative offence for doing so. Such restrictions can be justified under article 19, paragraph 3, only if they were “provided by law” and “necessary” for one of the legitimate aims.

3.2 The author further submits that she was convicted of an administrative offence under section 3.10 of the Ryazan Region Law and that, therefore, the restriction on the exercise of her right to freedom of expression was *de jure* “provided by law”. She argues, however, that under article 55, paragraph 3, of the Constitution, freedom of expression can be restricted only by federal law. Since the Ryazan Region Law is not a federal law, the interference with her right to freedom of expression did not comply with the Constitution, and, therefore, cannot be regarded as being “provided by law” within the meaning of article 19, paragraph 3, of the Covenant.

3.3 The author claims that, even if the interference was “provided by law”, it was not “necessary”, because it did not pursue one of the legitimate aims set out in article 19, paragraph 3, of the Covenant. She acknowledges that the aim of the restriction was to protect public health or morals of minors (in the Russian Federation, persons under 18) by prohibiting others from “inciting minors to have intimate relations between persons of the same sex”. In this regard, the author submits that she did not promote any ideas that would incite minors to such actions and that the purpose of her displaying posters was to educate the public, including minors, about a tolerant attitude towards homosexuality. She further claims that the wording of the Ryazan Region Law is not sufficiently clear, because it puts

an absolute ban on disseminating any ideas related to homosexuality, including objective or neutral information aimed at educating minors and helping them to develop a tolerant attitude towards homosexual individuals. The author argues that the blanket ban on imparting any information on homosexuality to minors makes her freedom of expression merely theoretic and illusory.⁵

3.4 In the present case, the author was fined for having displayed posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” which, pursuant to section 3.10 of the Ryazan Region Law, is an administrative offence against public morals defined as “propaganda of homosexuality among minors”. In this connection, the author submits that propaganda always implies dissemination of certain ideas or educating public on certain issues in order to change public opinion. From the Covenant’s perspective, propaganda is one of components of freedom of expression and, therefore, anyone has the right to advocate for certain ideas in relation to homosexuality.

3.5 The author further submits that homosexuality is an objective characteristic of a large group of individuals in any society. In the present case, the author claims that the Ryazan Region Law prohibits dissemination of any information related to homosexuality, including neutral in its content, among minors. Judging by the fact that section 3.10 is placed in chapter 3 of the Ryazan Region Law (administrative offences against health, sanitary and epidemiologic well-being and public morals),⁶ the aim of this prohibition is to protect morals of minors. It follows that the said law is based on the assumption that homosexuality is something immoral, which is clearly against modern understanding of homosexuality as a characteristic based on sexual orientation and not on someone’s conscious choice of sexual behaviour.

3.6 The author claims, therefore, that the Ryazan Region Law is also contrary to article 26 of the Covenant, which states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. She adds that the Ryazan Region Law discriminates against homosexual individuals by de facto prohibiting dissemination of any information about them among minors and that there is no objective justification for such difference in treatment under the Covenant. In this respect, the author refers to the Committee’s concluding observations on the sixth periodic report of the Russian Federation (CCPR/C/RUS/CO/6). The Committee noted with concern “the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media” (ibid., para. 27).

3.7 The author concludes by asking the Committee to find that the ruling of the Justice of the Peace of 6 April 2009, convicting her of an administrative offence for “propaganda of homosexuality among minors”, was disproportionate to any legitimate aims pursued and therefore violated article 19 and article 26 of the Covenant.

State party’s observations on admissibility

4.1 On 20 May 2010, the State party recalls the facts of the case and challenges the admissibility of the communication, arguing that the author did not exhaust all available

⁵ Reference is made the judgment of the European Court of Human Rights in *Church of Scientology Moscow v. Russia* (application No. 18147/02), 5 April 2007, para. 92, and judgment of the European Court of Human Rights in *Handyside v. United Kingdom* (application No. 5493/72), 7 December 1976, para. 49.

⁶ The original text in Russian reads as follows: “Административные правонарушения, посягающие на здоровье, санитарно-эпидемиологическое благополучие населения и общественную нравственность”.

domestic remedies. It submits that the author could have used the ordinary appeal procedures envisaged by article 30.9 of the Code on Administrative Offences and appealed the decision of the Federal Judge of the Oktyabrsky District Court dated 14 May 2009 to another judge of the same Oktyabrsky District Court or to the Ryazan City Court. Furthermore, the author could have lodged an appeal to the Supreme Court of the Ryazan Region and then, if necessary, to the Supreme Court of the Russian Federation, against the decision of the Oktyabrsky District Court, which already became executory, under the supervisory review procedure envisaged by article 30.12, part 1, of the Code on Administrative Offences. The State party argues that the author has deliberately not availed herself of these avenues for appeal and, consequently, her assertion that she had exhausted all domestic remedies does not “correspond to the facts”.

4.2 The State party also considers the present communication to be an abuse of the right of submission, because the author was not subjected to discrimination on any ground. It states that the institution of administrative proceedings against her was based on the fact that she breached specific legal provisions — and the author herself does not dispute this fact — and was unrelated to her sexual orientation. The State party submits, therefore, that the communication should be declared inadmissible under article 3 and article 5, paragraph 2 (b), of the Optional Protocol.

Author’s comments on the State party’s observations

5.1 On 22 July 2010, the author submits that the State party’s claim in relation to article 30.9 of the Code on Administrative Offences is based on the “misinterpretation of the basic provisions of the Russian administrative proceedings”. She argues that, under article 30.1 of the Code on Administrative Offences, a ruling on an administrative offence issued by a judge (as in her case) may be appealed to a higher court. For this reason, she appealed the ruling of the Justice of the Peace dated 6 April 2009 to a higher (second instance) court, that is, the Oktyabrsky District Court. The author further submits that article 30.9 of the Code on Administrative Offences invoked by the State party, does not apply to her case, because the provision in question covers appeals against decisions on administrative offences issued by non-judicial authorities, that is, State officials.

5.2 The author states that, pursuant to 329 of the Civil Procedure Code, decision of the higher (second instance) court becomes executory from the moment of its adoption. She adds in this regard that the Supreme Court of the Russian Federation has explained that article 30.9 of the Code on Administrative Offences does not provide for an opportunity to appeal against the decision of a higher (second instance) court and that, therefore, such decision became executory from the moment of its adoption.⁷ The author submits, therefore, that she has used all ordinary appeal procedures available to her under the State party’s law.

5.3 As to the State party’s claim that the author could have lodged an appeal under the supervisory review procedure, she argues that such a procedure is not an effective remedy within the meaning of the Optional Protocol, because it does not guarantee an automatic right to have the merits of the supervisory appeal considered by a panel of judges (the Presidium of the Ryazan Region Court or the Supreme Court of the Russian Federation). The author states that, according to article 381 of the Civil Procedure Code, a supervisory appeal is considered by a judge of the supervisory review court, who has a right to reject it without requesting the case file from the lower instance. Only if this judge finds the

⁷ Reference is made to letter No. 1536-7/gen of the Supreme Court dated 20 August 2003 on the explanations in relation to the procedure for entry into force of the rulings and/or decisions on administrative offences when they are being appealed.

appeal's arguments convincing enough, s/he may decide to request the case file and, at the judge's discretion, transmit the case for consideration by the panel of judges of the supervisory review court.

5.4 In deciding on the admissibility of the present communication, the author respectfully asks the Committee to consider the position of the European Court of Human Rights, which held on numerous occasions that the supervisory review procedure was not an effective remedy within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), as the grounds for quashing final judgments of the lower courts were not clear from the Civil Procedure Code and the procedure was not directly accessible to the applicants.⁸

5.5 The author further submits that she, together with the other two individuals, has made a last attempt to seek justice on the domestic level by appealing to the Constitutional Court. In its ruling of 19 January 2010, the Constitutional Court dismissed her appeal and held that the prohibition of propaganda of homosexuality as "intentional and uncontrolled dissemination of information capable of harming health, morals and spiritual development, as well as forming perverted conceptions about equal social value of traditional and non-traditional family relations – among individuals who, due to their age, lack the capacity to critically and independently assess such information" could not be considered as a violation of constitutional rights. Therefore, the author requests the Committee to conclude that the position of the Constitutional Court is contrary to the standards enshrined in the Covenant, because in a modern democratic society "traditional" (different-sex) and "non-traditional" (same-sex) relations should be considered as equally valuable. In her opinion, the Constitutional Court effectively upheld the approach of the Ryazan Region Law and the Ryazan Region Law on Protection of Morals of Children in Ryazan Region that any information about homosexuality is *prima facie* immoral and detrimental to the development of a child. The author argues that she has a right to disseminate information aimed at promoting the idea of equal value of homosexuals in the Russian society.

5.6 As transpires from the ruling of 19 January 2010, the Constitutional Court noted that article 38 of the Constitution specifically protects motherhood, childhood and the family. In the Court's view, the traditional understandings of family, motherhood and childhood are values that require special protection from the State. According to the Court, legislators acted on the premise that the interests of minors were an important social value. One of the aims of State policy on the protection of children was the protection of minors from factors that could negatively impact their physical, intellectual, mental, spiritual and moral development. More precisely, the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation protected children from information, propaganda and agitation that could harm their "health [and] moral and spiritual development". In the Court's view, the provisions challenged were adopted with the aim of ensuring the intellectual, moral and psychological security of children.

5.7 The Constitutional Court then analysed the protection of the right to freedom of expression provided by the Constitution. Article 29 of the Constitution guarantees the right

⁸ Reference is made to the decision of the European Court of Human Rights in *Martynets v. Russia* (application No. 29612/09), 5 November 2009, in which the Court examined the "new" supervisory review procedure (in force since 7 January 2008) governed by the Civil Procedure Code and concluded that "the supervisory review procedure in the courts of general jurisdiction retains the essential features that earlier compelled the Court to consider it as being outside the chain of domestic remedies subject to exhaustion under Article 35, 1 § of the Convention". Furthermore, the Court found that "the supervisory review proceedings in respect of legally binding judgments may still be conducted through multiple instances, with an ensuing risk that the case will go back and forth from one instance to another for an indefinite period".

to freedom of speech, as well as the right to freely disseminate information by all lawful means. However, the Court noted that, under article 10 of the European Convention, freedom of expression was subject to limitations, provided such limitations were established by law, had a legitimate purpose and were necessary in a democratic society. Finally, the Court established that the Ryazan Region Law and the Ryazan Region Law on Protection of Morals of Children in Ryazan Region did not prohibit or disparage homosexuality. They did not discriminate against homosexuals nor did they grant excessive powers to public authorities. The Court therefore concluded that the provisions of the said laws that were challenged could not be considered to limit freedom of expression excessively.

5.8 The author submits a copy of the legal opinion prepared by the International Commission of Jurists upon her request and asks the Committee to take it into account in considering the merits of her communication.

5.9 In its legal opinion, the International Commission of Jurists firstly considers the effect of the Committee's Views in *Hertzberg et al. v. Finland*,⁹ in which it accepted, as a justification provided for in article 19, paragraph 3, of the Covenant, the public morals limitation invoked by the Government of Finland in defence of paragraph 9 of chapter 20 of the Finnish Penal Code, which provided that anyone who "publicly encourages indecent behaviour between persons of the same sex" was subject to a six-month prison sentence or a fine. The International Commission of Jurists submits that the outcome in the said communication is not dispositive of this matter, because:

(a) Equality law, in the jurisprudence of the Committee and other human rights bodies, has developed significantly since April 1982 when the Views in *Hertzberg et al. v. Finland* were adopted. At that time, sexual orientation was not recognized as a status protected from discrimination and now it is;¹⁰

(b) Also since 1982, the Committee and other institutions have recognized that limitations on rights must not violate the prohibition of discrimination. Even a limitation with a permissible aim — such as the protection of public morality — may not be discriminatory;

(c) Conceptions of public morality are subject to change¹¹ and what was considered justifiable with reference to public morality in 1982 is no longer the case today. Laws similar to paragraph 9 of chapter 20 of the Finnish Penal Code have since been repealed in States such as Austria and the United Kingdom of Great Britain and Northern Ireland. Furthermore, the Committee's jurisprudence reflects the evolution of the "public morals" conceptions, as does the case law of the European Court of Human Rights.¹²

5.10 The International Commission of Jurists then submits that the Ryazan Region Law is an impermissible limitation of freedom of expression because it is discriminatory, for the following reasons: (a) sexual orientation is a protected ground under articles 2 and 26 of the Covenant;¹³ (b) limitations on rights cannot be discriminatory, whether in law or practice –

⁹ Communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

¹⁰ Reference is made to communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.7.

¹¹ Reference is made to the Individual Opinion of Torkel Opsahl in *Hertzberg et al. v. Finland*.

¹² Reference is made to *Toonen v. Australia*; and judgment of the European Court of Human Rights in *Dudgeon v. United Kingdom* (application No. 7525/76), 22 October 1981.

¹³ Reference is made to *Toonen v. Australia*; communication No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4. See also, general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights on non-discrimination in economic, social and cultural rights, *Official Records of the Economic and Social Council, 2010, Supplement No. 2 (E/2010/22)*, annex VI,

a law that differentiates on the basis of sexual orientation is therefore discriminatory, in violation of the Covenant, unless it has a reasonable and objective justification, and is aimed at a legitimate purpose; and (c) public morality is not a reasonable and objective justification.

5.11 The International Commission of Jurists argues that enjoyment of all Convention rights without discrimination means that the freedom of expression of LGBT individuals, as well as the expression concerning sexual orientation and same-sex relationships cannot be restricted in a discriminatory manner. Any restriction on expression about sexuality must be neutral with respect to sexual orientation.¹⁴ Laws restricting freedom of expression must be compatible with the aims and objectives of the Covenant and must not violate its non-discrimination provisions.¹⁵ They may not be imposed for discriminatory purposes or applied in a discriminatory manner.¹⁶ The International Commission of Jurists argues that even the proportionate use of a permissible aim, such as public morality, cannot be the basis for a restriction on freedom of expression if it is applied in a discriminatory manner. Therefore, by penalizing “public actions aimed at propaganda of homosexuality” — as opposed to propaganda of heterosexuality or sexuality generally — the Ryazan Region Law enacts a difference in treatment that cannot be justified. It singles out one particular kind of sexual behaviour for differential treatment. It does so even though sexual relationships between consenting adults of the same sex are not illegal in the Russian Federation.

5.12 Furthermore, although not every differentiation of treatment will constitute discrimination, the criteria for such differentiation must be reasonable and objective and the aim must be to achieve a purpose that is legitimate under the Covenant.¹⁷ Because sexual orientation is a prohibited ground, a difference in treatment founded on sexual orientation constitutes discrimination, in violation of the Covenant, unless there is a “reasonable and objective” justification.¹⁸ Public morality does not amount to such a justification. Since *Hertzberg et al. v. Finland*, public morality arguments have diminished in weight.¹⁹ The International Commission of Jurists submits that courts around the world have held that public morality is not a sufficient reason to justify a difference in treatment and established that concerns about public morality cannot serve to defend disparate treatment based on

para. 32; general comment No. 2 (2007) of the Committee against Torture on implementation of article 2 by States parties, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI, para. 21; general comment No. 4 (2003) of the Committee on the Rights of the Child on adolescent health and development in the context of the Convention on the Rights of the Child, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41* (A/59/41), annex X, para. 6.

¹⁴ Reference is made to the recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. Available from <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

¹⁵ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, annex, E/CN.4/1985/4, principle 2; Committee’s general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex VI, para. 8.

¹⁶ Committee’s general comment No. 22, para. 8; and the Individual Opinion of Torkel Opsahl in *Hertzberg et al. v. Finland*.

¹⁷ Reference is made to the Committee’s general comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 13.

¹⁸ General comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights, para. 13.

¹⁹ Reference is made to *Toonen v. Australia*, para. 8.6; and judgment of the European Court of Human Rights in *Open Door and Dublin Well Woman v. Ireland* (applications Nos. 14234/88 and 14235/88), 29 October 1992, paras. 65–66.

sexual orientation.²⁰ It adds that the Ryazan Region Law is clearly intended to target any information about homosexuality, including information that is in no manner “obscene” under criminal law.

5.13 The International Commission of Jurists further submits that the Ryazan Region Law also has serious implications for the right of children to receive information. In addition to article 19, paragraph 2, of the Covenant, the right of children to receive information concerning sexuality is specifically protected under article 13 of the Convention on the Rights of the Child.²¹ The right of children to receive information about sexuality and sexual orientation is related to their rights to education and to health.²²

5.14 For the foregoing reasons, the International Commission of Jurists concludes that section 3.10 of the Ryazan Region Law contravenes the State party’s obligations under the Covenant.

State party’s further observations on admissibility and merits

6.1 On 9 December 2010, the State party recalls the facts of the case and states that the administrative fine imposed by the Justice of the Peace on the author was the minimal penalty provided for under section 3.10 of the Ryazan Region Law and was not “burdensome” for her. The State party then submits that all court decisions in the author’s case are lawful and well-founded, and puts forward its arguments, which are similar in substance to those of the Oktyabrsky District Court (see para. 2.6 above) and of the Constitutional Court (see para. 5.6 above). It states that the author’s claims about her being brought to administrative responsibility for her tolerant attitude towards homosexuality and for the free expression of her views do not “correspond to the facts”. She was brought to administrative responsibility for *propaganda of homosexuality (sexual act between men and lesbianism) among minors*.²³

6.2 The State party further submits that, according to the author, the aim of her actions was to promote a tolerant attitude towards homosexuality in the society, including among minors. Therefore, she had a deliberate intent to engage children in the discussion of these issues. As a result, the public became aware of the author’s views exclusively on the initiative of the latter. Furthermore, her actions from the very beginning had an “element of provocation”. The State party adds that the author’s private life was not of interest either to the public or to minors, and that the public authorities did not interfere with her private life. For these reasons, the State party reiterates its initial argument that the present communication is an abuse of the right of submission and is thus incompatible with article 3 of the Optional Protocol.

6.3 The State party recalls that the author has deliberately not availed herself of the right to have recourse to the supervisory review procedure and that, therefore, her assertion that

²⁰ The legal opinion, inter alia, quotes the case law of the United States Supreme Court, the Constitutional Court of South Africa and the Philippines Supreme Court.

²¹ Reference is also made to the general comment No. 3 (2003) of the Committee on the Rights of the Child on HIV/AIDS and the Rights of the Child, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41* (A59/41), annex IX, para. 16; and the concluding observations of the Committee on the Rights of the Child on the second periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, para. 44 (d).

²² Reference is made to the reports of the Special Rapporteur on the right to education, A/HRC/8/10/Add.1, paras. 79–84, and A/HRC/4/29/Add.1, paras. 34–37. See also, decision of the European Committee of Social Rights, *INTERIGHTS v. Croatia* (complaint No. 45/2007), 30 March 2009.

²³ Emphasis added by the State party.

she had exhausted all domestic remedies does not “correspond to the facts”. For the foregoing reasons, the State party concludes that the author’s claims are groundless, the interference with her rights was proportionate and the communication itself is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Authors’ comments on the State party’s further observations

7.1 On 3 February 2011, the author recalls the State party’s argument that bringing her to administrative responsibility had a legitimate aim of protecting children from “propaganda of homosexuality”, i.e. from information harmful to children from a moral point of view. In this respect, she submits that this approach is clearly discriminatory, as it is based on a presumption that homosexuality — as opposed to heterosexuality — is something immoral. The author adds that this approach lacks objective and reasonable justification because, in her opinion, it prohibits dissemination of any information on homosexuality, including neutral information, such as in the present communication. She draws the Committee’s attention to the findings of the European Court of Human Rights in *Alekseyev v. Russia*,²⁴ concerning the ban by the Moscow authorities on the so called “Gay Prides” in 2006–2008. The author respectfully asks the Committee to consider the position of the European Court of Human Rights with regard to the public morality arguments raised by the State party.

7.2 With regard to the State party’s argument concerning the alleged non-exhaustion of domestic remedies, the author reiterates her earlier position explained in the submission of 22 July 2010 that the supervisory review procedure is not an effective remedy. Moreover, any doubts in this regard have been dispelled by the decision of the Constitutional Court of 19 January 2010.

7.3 On 21 November 2011, the author asks the Committee to give priority treatment to the present communication, which is seen by her as being of significance for the development of jurisprudence in the field of LGBT rights. She submits that recent developments threaten the fundamental human rights of LGBT individuals in the Russian Federation²⁵ and in other parts of the world,²⁶ including the freedom of expression, freedom of assembly and freedom of association.

²⁴ Judgment of the European Court of Human Rights in *Alekseyev v. Russia* (applications Nos. 4916/07, 25924/08 and 14599/09), 21 October 2010, paras. 82–84. The Court found a violation of article 11; article 13 in conjunction with article 11; and article 14 in conjunction with article 11 of the European Convention.

²⁵ Notably: (a) On 28 September 2011, the Parliament of the Arkhangelsk Region passed a similar law which prohibited propaganda of homosexuality among minors. This law came into force in October 2011. On 16 November 2011, the same Parliament passed amendments to the Arkhangelsk Region Law on Administrative Offences establishing administrative liability for propaganda of homosexuality among minors; (b) on 16 November 2011, the St. Petersburg Legislative Assembly adopted at its first reading a law which prohibited “propaganda of sexual act between men, lesbianism, bisexuality, transgenderism and paedophilia” and introduced fines for such actions. According to the media reports, an amendment of 7 March 2012 to the Law on Administrative Offences in St. Petersburg established administrative liability for “public actions aimed at propaganda of sexual act between men, lesbianism, bisexuality and transgenderism among minors” (art. 7.1) and “public actions aimed at propaganda of paedophilia” (art. 7.2); (c) on 16 November 2011, the speaker of the Moscow City Duma (parliament) said in an interview that a law banning propaganda of homosexuality among minors would definitely be passed in Moscow; (d) on 17 November 2011, the speaker of the Federation Council (upper chamber of the State Duma) supported introduction of a similar law on federal level.

State party's additional observations

8.1 On 17 August 2012, the State party submits its additional observations. It states that the amendments to the St. Petersburg and the Arkhangelsk Region Laws on Administrative Offences were introduced with the aim of “combating the propaganda of sexual act between men, lesbianism, bisexuality and transgenderism among minors, as well as the propaganda of paedophilia, due to the numerous and collective requests of community representatives who expressed their protest against such propaganda”. The State party refers to the Model Law on Protection of Children against Information Detrimental to Their Health and Development that was adopted by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States on 3 December 2009. According to this Law, “propaganda” stands for “activities of natural and (or) legal persons disseminating information aimed at conditioning children’s behaviour and (or) creating stereotypes, or aimed at encouraging or effectively encouraging addressees of such information to perform certain actions or to refrain from performing certain actions”.

8.2 The State party adds that the said law considers as “information detrimental to children’s health and development information — the contents, presentation and (or) use of which — influence one’s subconscious mind and are capable of harming children’s physical or mental health and (or) provoking derangements of their spiritual, mental, physical and social development”. Such “derangements” include “development of perverted social preferences and attitudes, instigation to commit potentially dangerous deeds and acts, aggression, cruelty, violence or other antisocial actions (including those punishable by criminal law), inculcation of pathologic fear and horror or encouragement of children’s premature interest in sex and in early commencement of sexual life”.

8.3 The State party also refers to article 4, paragraph 1, article 5, paragraph 2, and article 14 of the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation and submits that one of the objectives of the State policy carried out in the Russian Federation in the interests of the children is to protect them from the factors that could negatively impact their physical, intellectual, mental, spiritual and moral development.

8.4 The State party further submits that in order to protect children from information detrimental to their health and (or) development, the Federal Law on Protection of Children against Information Detrimental to Their Health and Development of 29 December 2010 (in force as of September 2012) established requirements for the dissemination of information to children. The requirements include classification of information outputs, their expert assessment, as well as the State oversight and control of the compliance with the law on protection of children against information detrimental to their health and (or) development.

8.5 The State party recalls that the rights guaranteed under article 19, paragraph 2, of the Covenant are subject to certain restrictions provided for in paragraph 3 of the same article. It refers in this context to articles 17 and 34 of the Convention on the Rights of the Child, as well as to article 4, paragraph 2, of the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation, which sets out standards for the dissemination of printed, audio, video and other materials inadvisable for children below the age of 18.

8.6 The State party maintains that the Constitutional Court has carefully examined the facts of the case submitted by the author and two others, as well as their arguments before

²⁶ Earlier attempts to introduce a similar law were taken on the national level in Lithuania. The proposals were rejected only after the intervention from the European Union. A similar law which prohibits propaganda of homosexuality is currently being discussed in Ukraine.

arriving at the conclusion that pursuant to the requirements of the Federal Law on Protection of Children against Information Detrimental to Their Health and Development, lawmakers of the Ryazan Region adopted measures aimed at ensuring intellectual, moral and mental safety of children in the Ryazan Region by, inter alia, prohibiting public actions aimed at propaganda of homosexuality. The State party also reiterates the finding of the Constitutional Court that the prohibition of such propaganda per se as “intentional and uncontrolled dissemination of information capable of harming health, morals and spiritual development, as well as forming perverted conceptions about equal social value of traditional and non-traditional family relations – among individuals who, due to their age, lack the capacity to critically and independently assess such information” could not be considered as a violation of constitutional rights.

8.7 The State party argues that, in her comments, the author does not put forward any new arguments in relation to the substance of the present communication but rather interprets provisions of international law. It adds that the State party’s submissions of 20 May 2010 and 9 December 2010 cover both the admissibility and the merits. As to the author’s comments in relation to the adoption of the laws prohibiting propaganda of sexual act between men, lesbianism, bisexuality and transgenderism among minors at the regional level, the State party submits that such laws are in full compliance with the international obligations of the Russian Federation and are aimed at protecting moral, spiritual, physical and mental development of children.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party’s argument that the author could have used the ordinary appeal procedures envisaged by article 30.9 of the Code on Administrative Offences. In this respect, the Committee recalls that the State party must describe in detail which legal remedies would have been available to the author in the circumstances of her case, together with evidence that there would be a reasonable prospect that such remedies would be effective.²⁷ Given the fact that article 30.9 of the Code on Administrative Offences does not seem to be applicable to the present communication as argued by the author, because it covers appeals against decisions on administrative offences issued by non-judicial authorities, the Committee accepts the author’s argument, which has not been challenged by the State party, that she has used all ordinary appeals procedures available to her under the State party’s law.

9.4 The Committee also notes the State party’s claim that the author could have lodged an appeal against the decision of the Oktyabrsky District Court, which already became executory, under the supervisory review procedure envisaged by article 30.12, part 1, of the Code on Administrative Offences. The Committee further notes the author’s argument that such procedure is not an effective remedy within the meaning of the Optional Protocol,

²⁷ See communication No. 4/1977, *Ramirez v. Uruguay*, Views adopted on 23 July 1980, para. 5.

because it does not guarantee an automatic right to have the merits of the supervisory appeal considered by a panel of judges. Moreover, she has already unsuccessfully challenged the constitutionality of the Ryazan Region Law on the basis of which she was convicted of an administrative offence before the Constitutional Court.

9.5 In this regard, the Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.²⁸ It notes that the Constitutional Court has dismissed the author's appeal holding that the prohibition of propaganda of homosexuality could not be considered as a violation of her constitutional rights and that the State party does not claim that the courts that could have considered the author's case under the supervisory review procedure would (or even could) have arrived at an outcome different to that of the Constitutional Court. The Committee considers, therefore, that it would not be reasonable to require the author to have recourse to the supervisory review procedure, because such remedy could no longer be seen as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, i.e. a remedy that would provide the author with a reasonable prospect of judicial redress.²⁹ The Committee, therefore, is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

9.6 The State party further argues that the present communication is inadmissible under article 3 of the Optional Protocol and constitutes an abuse of the right of submission, because the author was not subjected to discrimination on any ground, in particular, on the ground of her sexual orientation, and the State party's public authorities did not interfere with her private life. The Committee considers, however, that the arguments put forward by the author — that she was convicted of an administrative offence on the basis of section 3.10 of the Ryazan Region Law which allegedly discriminates against homosexual individuals — raise substantive issues and should be dealt with at the merits stage of the proceedings.

9.7 Accordingly, the Committee finds no further obstacles to the admissibility and declares the author's claims under articles 19 and 26 of the Covenant sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

10.2 The first issue before the Committee is whether or not the application of section 3.10 of the Ryazan Region Law to the author's case, resulting in her conviction of an administrative offence and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to freedom of expression. The Committee notes that section 3.10 of the Ryazan Region Law establishes administrative liability for "propaganda of homosexuality (sexual act between men or lesbianism) among minors". The Committee observes, however, that the wording of section 3.10 of the Ryazan Region Law is ambiguous as to whether the term "homosexuality (sexual act between men or lesbianism)" refers to one's sexual identity or sexual activity or both. In any case, there is no doubt that there has been a restriction on the exercise of the author's right to freedom of

²⁸ Communication No. 327/1988, *Barzhig v. France*, Views adopted on 11 April 1991, para. 5.1, and *Young v. Australia*, para. 9.4.

²⁹ Communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 6.1.

expression guaranteed by article 19, paragraph 2, of the Covenant.³⁰ In fact, the existence of the restriction in the present communication is not in dispute between the parties.

10.3 The Committee then has to consider whether the restriction imposed on the author's right to freedom of expression is justified under article 19, paragraph 3, of the Covenant, i.e. provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls in this respect its general comment No. 34 (2011) on article 19 (freedoms of opinion and expression) of the International Covenant on Civil and Political Rights,³¹ in which it stated, inter alia, that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.³² Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".³³

10.4 The Committee observes that, in the present case, the author and the State party disagree as to whether the restriction on the exercise of the right to freedom of expression is "provided by law". In particular, the author argues with reference to article 55, paragraph 3, of the Constitution, that freedom of expression can be restricted only by federal law, whereas the Ryazan Region Law on the basis of which she was convicted of an administrative offence for "propaganda of homosexuality among minors" is not a federal law. The State party in turn submits that the Ryazan Region Law is based on the Constitution and the Code on Administrative Offences, thus it is a part of the law on administrative offences. The Committee may dispense with considering this point because, irrespective of the domestic lawfulness of the restriction in question, laws restricting the rights enumerated in article 19, paragraph 2, must not only comply with the strict requirements of article 19, paragraph 3, of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant,³⁴ including the non-discrimination provisions of the Covenant.³⁵

10.5 In this respect, the Committee recalls, as stated in its General Comment No. 34, that "'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination".³⁶ In the present case, the Committee observes that section 3.10 of the Ryazan Region Law establishes administrative liability for "public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)" — as opposed to propaganda of heterosexuality or sexuality generally — among minors. With reference to its earlier jurisprudence,³⁷ the Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.

³⁰ Communication No.780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

³¹ *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 40 (A/66/40 (Vol. I)), annex V.*

³² See *ibid.*, para. 2.

³³ *Ibid.*, para. 22.

³⁴ See *ibid.*, para. 26; and *Toonen v. Australia*, para. 8.3.

³⁵ General comment No. 34, para. 26, and general comment No. 18, para. 13.

³⁶ General comment No. 34, para. 32.

³⁷ See *Toonen v. Australia*, para. 8.7; *Young v. Australia*, para. 10.4; and communication No. 1361/2005, *X. v. Colombia*, Views adopted on 30 March 2007, para. 7.2.

10.6 The Committee also recalls its constant jurisprudence that not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective criteria,³⁸ in pursuit of an aim that is legitimate under the Covenant.³⁹ While noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” — as opposed to propaganda of heterosexuality or sexuality generally — among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced.⁴⁰

10.7 Furthermore, the Committee is of the view that, by displaying posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building, the author has not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it.

10.8 The Committee notes the State party’s arguments that the author had a deliberate intent to engage children in the discussion of the issues raised by her actions; that the public became aware of the author’s views exclusively on the initiative of the latter; that her actions from the very beginning had an “element of provocation” and her private life was not of interest either to the public or to minors, and that the public authorities did not interfere with her private life (see para. 6.2 above). While the Committee recognizes the role of the State party’s authorities in protecting the welfare of minors, it observes that the State party failed to demonstrate why, on the facts of the present communication, it was necessary for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the author’s right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality. Accordingly, the Committee concludes that the author’s conviction of an administrative offence for “propaganda of homosexuality among minors” on the basis of the ambiguous and discriminatory section 3.10 of the Ryazan Region Law, amounted to a violation of her rights under article 19, paragraph 2, read in conjunction with article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the Russian Federation of article 19, paragraph 2, read in conjunction with article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at the situation of April 2009 and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation

³⁸ See, inter alia, communication No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1982, para. 13; communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, para. 13; communication No. 218/1986, *Vos v. the Netherlands*, Views adopted on 29 March 1989, para. 11.3; communication No. 415/1990, *Pauger v. Austria*, Views adopted on 26 March 1992, para. 7.3; communication No. 919/2000, *Müller and Engelhard v. Namibia*, Views adopted on 26 March 2002, para. 6.7; and communication No. 976/2001, *Derksen v. the Netherlands*, Views adopted on 1 April 2004, para. 9.2.

³⁹ See, inter alia, communication No. 1314/2004, *O’Neill and Quinn v. Ireland*, Views adopted on 24 July 2006, para. 8.3.

⁴⁰ See *Young v. Australia*, para. 10.4; and *X v. Colombia*, para. 7.2.

to prevent similar violations in the future and should ensure that the relevant provisions of the domestic law are made compatible with articles 19 and 26 of the Covenant.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**FF. Communication No. 1940/2010, *Cedeño v. Bolivarian Republic of Venezuela*
(Views adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	Eligio Cedeño (represented by counsel, Emilio Berrizbeitia)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Bolivarian Republic of Venezuela
<i>Date of communication:</i>	9 March 2010 (initial submission)
<i>Subject matter:</i>	Conduct of the trial in a criminal case
<i>Procedural issue:</i>	Domestic remedies unreasonably prolonged
<i>Substantive issues:</i>	Arbitrary detention; violation of judicial guarantees
<i>Articles of the Covenant:</i>	9 and 14, paragraphs 1, 2 and 3 (a), (b) and (c)
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2012,

Having concluded its consideration of communication No. 1940/2010, submitted to the Human Rights Committee on behalf of Mr. Eligio Cedeño under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Eligio Cedeño, a Venezuelan national born on 1 December 1964. He claims to be the victim of a violation by the Bolivarian Republic of Venezuela of his rights under article 2; article 9, paragraphs 1, 2, 3 and 4; and article 14, paragraphs 1, 2 and 3 (a), (b) and (c), of the Covenant. He is represented by counsel, Mr. Emilio Berrizbeitia.

The facts as submitted by the author

2.1 The author was a vice-president of finance at Banco Canarias. He claims that he provided financial support to politicians opposing the Venezuelan Government and to

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvio, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

leaders and other prominent figures of civil society. Because of this support, he has been a victim of retaliatory action by the Government.

2.2 In February 2003, the Government introduced strict foreign exchange controls. The exchange rate was fixed by the Central Bank, and the Foreign Exchange Administration Commission (CADIVI) was set up to manage the foreign exchange system. Any entity wishing to acquire foreign currency needed to seek authorization from CADIVI. Banco Canarias was registered as a foreign exchange dealer authorized to handle requests for foreign currency and the associated foreign exchange transactions.

2.3 In June 2003, through the intermediary of Banco Canarias, Consorcio Microstar (hereinafter Microstar) asked CADIVI for a substantial sum of United States dollars to acquire computers that it said had been shipped to the State party and were being held in customs. CADIVI approved the currency transaction without realizing that the computers had never entered the State party and that the invoices submitted by Microstar were falsified.

2.4 On 4 November 2003, the Public Prosecution Service (*Ministerio Público*) opened an investigation in response to a complaint filed by the National Tax and Customs Superintendent in relation to the forged documents that Microstar had allegedly submitted to Banco Canarias, its foreign exchange dealer. On 29 November 2005, the author was indicted by the Attorney-General's Office (*Fiscalía General*) on charges of smuggling by simulating the importation of goods and tax evasion. The author applied for the case to be dismissed on the grounds that the acts in question could not be attributed to him; under Venezuelan law, CADIVI was the only body legally empowered to verify and authorize foreign exchange transactions, and foreign exchange dealers were involved only after CADIVI had given authorization. His application was ignored and the Attorney-General's Office continued with the investigation. Subsequently, because his application for dismissal had not been granted and CADIVI's possible responsibility was being totally ignored in the criminal investigations, the author filed a request for cognizance (*recurso de avocamiento*) before the Supreme Court. On 16 November 2006, the Supreme Court called for the Public Prosecution Service to investigate all persons who might have been involved in the events at the root of the alleged offences. The case was referred to the third trial court of first instance of the criminal court circuit of Caracas Metropolitan Area (Court No. 3), where it was assigned to a provisional judge. The provisional judge refused the author's application for dismissal and the Public Prosecution Service continued the investigation without considering the potential responsibility of CADIVI. Both the judge and the prosecutors were provisional, and could therefore be removed at any time without any disciplinary proceedings.

2.5 On 7 February 2007, the Attorney-General's Office applied to Court No. 3 for the author's pretrial detention, on the grounds that the investigations conducted since the formal indictment had brought a new offence to light. The Attorney-General's Office accused the author of embezzlement, for having improperly used currency belonging to Banco Canarias to fund the Microstar transaction. The author maintains that Banco Canarias never filed any complaint about this and that the charge did not appear in the initial indictment. The application for a pretrial detention order stated that the author had illegally appropriated funds but did not include a detailed description of any facts or evidence attesting to an offence having been committed. On 8 February 2007, the author voluntarily presented himself to the authorities. Given that the charge was embezzlement and that Banco Canarias clients had apparently suffered severe losses as a result, the judge presiding over Court No. 3 argued that there was a risk of the author attempting to abscond or obstruct the course of justice. Since he was known to have considerable financial resources and was the owner of an aircraft, she ordered that he be placed in pretrial detention. The legal prerequisites that must be met prior to the adoption of such a measure

were ignored, as was the fact that the author was already banned from leaving the country. The author appealed against the pretrial detention order. On 13 March 2007, the Appeal Court dismissed the author's appeal. Subsequently, the Attorney-General's Office received a report from the Ministry of the Economy and Finance which concluded that the source of the foreign currency was a third party unconnected to Banco Canarias. However, the Office did not make this information available either to the Court or to the defence team. In addition, on 16 March 2007, Court No. 3 refused the author's request to review his file in person and ascertain the scope of the charges and allegations against him.

2.6 On 26 March 2007, the Attorney-General's Office filed a formal accusation against the author before Court No. 3 on charges of embezzlement and complicity in smuggling by simulating the importation of goods. A further written accusation against the author was subsequently filed, on 20 April 2007, adding a third charge of complicity in the fraudulent acquisition of foreign currency. At the preliminary hearing on 9 May 2007, the formal accusation presented by the Attorney-General's Office was imprecise and did not meet the legal prerequisites. Nonetheless, the judge admitted almost all the evidence presented by the Attorney-General's Office and disallowed the documentary evidence offered by the author, admitting the testimony of only 2 of the 15 witnesses proposed by him. This decision was appealed without success. The author claims that the judge was promoted as a result of the bias she showed and at the time of the communication's submission was the presiding circuit judge of the criminal court circuit of the Caracas Metropolitan Area.

2.7 At the preliminary stage of the trial in June 2007, the Attorney-General's Office sought to recuse the first two judges who had been assigned to the case at random. Although the recusal motion was denied, the judges subsequently recused themselves due to external pressures. One of them received a letter from the President of the Supreme Court in which it was suggested that, if he did not recuse himself, he would be immediately dismissed. The recusal of a third judge, due to her friendship with one of the prosecutors, was accepted by the Appeal Court on 2 October 2007.

2.8 On 20 November 2007, the author petitioned the Supreme Court to declare the detention order, the preliminary hearing and the trial null and void and to order his release on the grounds that he had not been properly indicted on the embezzlement charge on which the application for a detention order had been based (request for cognizance).

2.9 The oral proceedings began on 31 March 2008. After the evidence had been presented and the hearing of the closing arguments had been scheduled for 9 June 2008, without explanation the prosecution team failed to turn up.

2.10 On 17 December 2008, the Attorney-General's Office requested a 2-year extension of the period of pretrial detention without providing reasons to substantiate the request.

2.11 In March 2009, the author's lawyers submitted the case to the United Nations Working Group on Arbitrary Detention and the Special Rapporteur on the independence of judges and lawyers.

2.12 On 18 March 2009, the Supreme Court issued Decision No. 2009-0008, announcing a comprehensive reorganization of the judiciary over a period of one year and authorizing the Judicial Commission to suspend, with or without pay, judges and administrative staff who did not pass the institutional evaluation, and to fill the positions that thus became vacant. The decision did not establish any evaluation criteria.

2.13 On 7 May 2009, the Supreme Court found that the author was never properly indicted on the embezzlement charge and that his right to be included in the corresponding investigation had been curtailed, in violation of his right to a defence, his right to be heard and his right to be presumed innocent, in that the Attorney-General's Office did not inform him that a new offence had come to light and failed to summon him to give a statement. It

therefore declared the entire proceedings null and void, causing the trial to revert to the preliminary phase, and granted the Attorney-General's Office 30 days to issue a new indictment against the author. However, it did not order the author's release. On 26 and 27 May 2009, the Attorney-General's Office charged the author with embezzling Banco Canarias funds, without alleging any new facts, and requested an extension of the author's pretrial detention. On 4 June 2009, the twenty-seventh criminal trial court of first instance of the Caracas Metropolitan Area (Court No. 27) heard the new charge. Court No. 27 added a further 2 years to the maximum allowable period of pretrial detention on the grounds that the case file was large and complex. On 18 June 2009, the Attorney-General's Office formally indicted the author on the charge of embezzlement. The author claims that the Court should have ruled that the new indictment against him was filed after the time limit, based on the deadline set for this purpose in the Supreme Court's judgement, as he had requested on 11 June 2009.

2.14 On 1 September 2009, the Working Group on Arbitrary Detention issued Opinion No. 10/2009.¹ In the absence of a response from the State party, the Working Group found that the proceedings against the author had stalled for a lengthy period as a result of inaction on the part of the Counsel-General's Office (*Procuraduría General*) and that the author's pretrial detention, which exceeded the maximum term established under Venezuelan law, and the refusal to grant bail, even though there was no reason to believe that the author was seeking to evade justice, constituted violations of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, and that his detention was therefore arbitrary. The Working Group on Arbitrary Detention asked the State party to release the author on bail until the end of the trial and to take measures to ensure that the proceedings did not suffer further undue delays.

2.15 On 8 October 2009, the Appeal Court amended the decision of Court No. 27, reducing the extension of the period of pretrial detention to 8 months. These 8 months were to be counted from the date of completion of the initial 2-year period, i.e. from 8 February 2009, and therefore ended on the date of the Appeal Court's decision. Nonetheless, the Court failed to order the author's release. The case was subsequently transferred to the thirty-ninth criminal trial court of first instance of the Caracas Metropolitan Area (Court No. 39), which omitted to order the author's release despite applications from his defence. The author responded to this omission by filing a habeas corpus petition. On 15 October 2009, the Attorney-General's Office asked the Appeal Court to clarify the point in time from which the 8-month extension to the period of pretrial detention should be counted. At the same time, it filed an application for *amparo* before the Constitutional Chamber of the Supreme Court, alleging a violation of the constitutional rights of the prosecutor on the grounds that the Appeal Court had exceeded its jurisdiction and arbitrarily altered the length of the extension of the pretrial detention period without giving the parties the opportunity to make submissions on the subject. On 20 October 2009, the Supreme Court admitted the *amparo* application and ordered the effects of the Appeal Court's judgement to be suspended. At the same time, the Court clarified that the extension of the period of pretrial detention should be counted from the date on which the clarification was published. The clarification effectively altered the decision of 8 October 2009, in violation of the *res judicata* principle. The Appeal Court judge who issued the first judgement and disagreed with the clarifying judgement was subsequently demoted to the position of first-instance judge.

¹ A/HRC/13/30/Add.1.

2.16 Subsequently, the thirty-first “control court” of first instance (the court responsible for the investigative and preliminary phases) of the criminal judicial circuit of the Caracas Metropolitan Area (Court No. 31) was selected at random to hear the case against the author. On 10 December 2009, in view of the opinion of the Working Group on Arbitrary Detention, the absence of any risk of flight and the failure of the prosecution to appear on two consecutive occasions, the judge modified the precautionary measure of pretrial detention, ordering the author’s release on condition that he report to the court every two weeks and did not leave the country, and ordering him to relinquish his passport.

2.17 Having learned of this measure and of the author’s release, officers of the Intelligence and Prevention Services Directorate raided Court No. 31 and arrested all those present without a warrant, including the judge, Ms. M.L.A., and two bailiffs. The judge was taken to the Directorate’s headquarters. On 11 December 2009, it was reported that an order for the judge’s detention had been issued by the first control court of the criminal judicial circuit of the Caracas Metropolitan Area. At the same time, the police attempted to find and detain the author even though they had no court order. The author’s defence lawyers were subjected to intimidation. One of them was arrested and taken to the headquarters of the Military Intelligence Directorate where he was questioned for two days. On 11 December 2009, the President of the Republic referred to the author’s case in a radio and television programme on a national channel, calling him a “bandit” and accusing him of having “fled”. He also referred to the judge as a “bandit”, insinuated that she was corrupt and called for her to be sentenced to 30 years’ imprisonment. He stated that the lawyers defending the author had committed an offence in allegedly preparing in advance the decision issued by the judge. Lastly, he called for the President of the Supreme Court and the National Assembly to make the legislative amendments necessary to allow for the maximum sentence to be imposed upon the judge.

2.18 On 12 December 2009, the Attorney-General’s Office indicted Judge M.L.A. before Control Court No. 50 on charges of corruption, assisting an escape, conspiracy and abuse of power.

2.19 On 16 December 2009, the Chairperson of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders issued a joint press release concerning the detention of Judge M.L.A., in which they made reference to the author’s arbitrary detention and expressed fear that his defence lawyers could be facing imminent arrest.

2.20 On 18 December 2009, with a new provisional judge now presiding, Court No. 31 revoked the summons to appear in court issued to the author, since he had failed to do so, and issued a warrant for his arrest. Because of the grave risks he was facing, the author felt that he had no choice but to flee the country. At the time of the communication’s submission, he was in the United States, where he had submitted an asylum application. On 28 December 2009, the Supreme Court upheld an application from the Attorney-General’s Office for the author’s extradition.

The complaint

3.1 The author claims that the State party violated its obligations under article 2; article 9, paragraphs 1, 2, 3 and 4; and article 14, paragraphs 1, 2 and 3 (a), (b) and (c), of the Covenant.

3.2 His detention and the proceedings against him were in violation of article 9, paragraph 2, and article 14, paragraph 3 (a). The Attorney-General’s Office did not properly inform him of the nature of the charges against him and changed the charges when issuing the formal accusation without previously informing him. Thus, when the Attorney-

General's Office applied for the author's pretrial detention on the charge of embezzlement, he had not previously been indicted for this offence. In addition, the application for pretrial detention and the formal accusation contained only a general statement indicating that the author had unlawfully appropriated funds, but lacked a detailed description of the facts and an explanation of how they met the criteria necessary to constitute an offence. Accordingly, the author was denied the opportunity to understand the charges or the facts that supposedly substantiated the alleged offence. Furthermore, on 16 March 2007, Court No. 3 refused the author's request to review his file in person and ascertain the scope of the charges and allegations.

3.3 In relation to article 9, paragraphs 1 and 3, the author alleges that his detention was arbitrary. The detention order issued by Court No. 3 was based on the commission of an offence for which the author had not been indicted. It did not take account of the fact that the author had voluntarily presented himself to the authorities, his ties with the country — where his businesses, his home and his family were located — or the fact that he was already banned from travelling abroad. It also failed to demonstrate that he might interfere in the investigation or flee the country. He was not released on 9 February 2009 upon completion of the 2-year maximum period of pretrial detention permitted under article 244 of the Code of Criminal Procedure. His detention was extended despite the fact that the Attorney-General's request for extension was submitted after the time limit and failed to provide any evidence that might demonstrate the existence of substantive grounds. The author recalls that pretrial detention cannot be used in expectation of a conviction and that its use should be restricted to cases where there is a need to prevent suspects from obstructing the investigations or attempting to evade justice.

3.4 The author did not have access to a timely judicial review of his detention, as required under article 9, paragraph 4, of the Covenant, since his application for release on the grounds that his detention was based on an offence for which he had not been indicted was submitted to the Supreme Court on 20 November 2007 but was not resolved until 7 May 2009, i.e. nearly 18 months later. Although the Supreme Court found that the application was admissible, it did not order the author's release. Furthermore, even if the pretrial detention had been lawful, the author should have been released on 8 February 2009, after completing the maximum 2 years in detention permitted by law. He maintains that in any case, irrespective of its legality under domestic legislation, detention must not be arbitrary, i.e. the period of detention cannot exceed the time reasonably required to achieve the end pursued.

3.5 In relation to article 9, paragraph 3, and article 14, paragraph 3 (c), the author was not tried promptly and without delay. He was placed in pretrial detention on 8 February 2007. Two years and 10 months later, the trial was still in the preliminary phase. The considerable delays in the proceedings were attributable to the conduct of the Attorney-General's Office and were a reflection of deliberate delaying tactics on its part. On 7 May 2009, the Supreme Court considered the application for release submitted by the author almost 18 months earlier, established that he had not been properly indicted and, accordingly, declared the indictment and all subsequent proceedings null and void. The trial was restarted on the basis of a new indictment submitted by the Attorney-General's Office on 26 or 28 May 2009. The Supreme Court's decision was untimely and inopportune since all the evidence had already been heard in the regular proceedings originally suspended on 17 June 2008, whereas the appeal ruled on by the Supreme Court concerned the challenge to the pretrial detention order only, and this issue would have been resolved if the Supreme Court had allowed the trial to conclude. Finally, on 17 December 2008, the Attorney-General's Office requested the extension of the pretrial detention without providing reasons to substantiate its request.

3.6 The courts that heard the case against the author lack independence and impartiality, as required under article 14, paragraph 1, of the Covenant. The State party's system of provisional judges is in violation of the right to an independent judiciary since these judges are not secure in their positions and may be removed at will without any predefined procedure. Since 1999 the executive branch has openly intervened in the administration of justice, turning the system into an instrument for persecuting political opponents. Provisional judges and prosecutors who take decisions that are contrary to the wishes of the political powers-that-be are arbitrarily relieved of their duties and in many cases subjected to disciplinary proceedings. In contrast, those who act according to instructions are promoted to senior positions. Two of the judges who presided over the proceedings against the author were provisional, meaning that they could be removed at will for political reasons.² The judge hearing the case before Court No. 13 who replaced the pretrial detention order with a summons to report regularly to the court was subjected to retaliatory action on the part of the executive branch that was encouraged by the President of the State party and resulted in her immediate arrest and prosecution. At the time of the communication's submission, the judge was being held in pretrial detention.³

3.7 The judges did not act impartially. In November 2005, the judge hearing the case before Court No. 3 indicted the author on charges of smuggling by simulating the importation of goods and tax evasion, even though legislation absolved him of any criminal liability, as the manager of a bank acting as a foreign exchange dealer. The same judge ordered his pretrial detention even though detention was requested on the basis of an alleged offence for which he had not been indicted and there was no risk of flight. On 16 March 2007, the judge refused his request to have personal access to the file so that he could review it with his lawyers. On 9 May 2007, the judge held a preliminary hearing at which all the evidence presented by the Attorney-General's Office was allowed and almost all the documentary evidence presented by the defence was disallowed. On 24 September 2007, after taking cognizance of the case and taking decisions on it, the control judge of Court No. 27 asked to be recused because she was a good friend of the prosecutor representing the Public Prosecution Service. However, the same judge was reassigned to the author's case on 4 June 2009 and extended his pretrial detention for a further 2 years even though the extension was unfounded and unlawful, the only basis for the decision being the fact that the case file was so large. Furthermore, the judge did not take account of the fact that the Attorney-General's Office had submitted the extension request late, i.e. after the 30-day time limit set by the Supreme Court.

3.8 With regard to the right to have adequate time and facilities for the preparation of his defence, in accordance with article 14, paragraph 3 (b), of the Covenant, it is claimed that the author and his lawyers did not have full access to the file. On 16 March 2007, Court No. 3 refused his request to review the file and refused to admit the documentary evidence submitted by his defence, even though the documents in question proved conclusively that the local currency used in the Microstar transaction came from independent sources and was not the fruit of embezzling Banco Canarias funds. His lawyers were prevented from reviewing the full case file. On the grounds that they constituted information pertinent to

² The author refers to the case law of the Inter-American Court of Human Rights, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgement of 5 August 2008, and *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009, in which the Court found that from August 1999 and up to the present, provisional judges were not secure in their positions, their appointment was discretionary and they could be removed at will without any predefined procedure.

³ The author claims that, because of Supreme Court Decision No. 2009-0008, of 18 March 2009, announcing the reorganization of the judiciary, if the trial had recommenced, the independence of the courts could not have been guaranteed even if the judges were tenured.

the defence of the State party, the Attorney-General's Office unlawfully withheld official communications sent by the Ministry of the Economy and Finance and failed to inform the author of them in a timely manner. These communications confirmed that the Venezuelan currency used to fund the Microstar transaction consisted of negotiable instruments provided by third parties and that the author could not therefore have embezzled funds from Banco Canarias to finance the transaction.

3.9 The right to be presumed innocent, established in article 14, paragraph 2, of the Covenant, was not respected during the proceedings against the author. The author was denied the possibility of being tried while at liberty and was held in pretrial detention even though none of the legal requirements for such a measure were satisfied in his case. He was not released at the end of the 2-year maximum term of pretrial detention. Nor was the detention order revoked on 7 May 2009, when the Supreme Court agreed that the author had not been properly indicted and, on this basis, declared the earlier decisions to be null and void. On 4 June 2009, the pretrial detention order was extended, allowing for the author to be held for a further 2 years. Furthermore, the proceedings against the author were guided by the political motivations of the executive branch, as was clearly demonstrated when the President of the Republic referred to the case on television and radio on 11 December 2009.

3.10 The alleged violations of articles 9 and 14 of the Covenant through acts and omissions of the State authorities also constitute a violation of article 2 of the Covenant.

3.11 With regard to the exhaustion of domestic remedies, the author maintains that, at the time of the communication's submission to the Committee, almost four years after the indictment issued by the Attorney-General's Office in 2005, the trial had still not reached the preliminary hearing stage and that, consequently, he had been neither tried nor convicted at first instance. Thus, the proceedings initiated against him in the Venezuelan courts were unreasonably prolonged, especially given that he was kept in pretrial detention for the entire period. He maintains that the prolongation of the proceedings in his case can be justified neither by its complexity nor by the defence's action in availing itself of the legal remedies available.

3.12 The same matter is not being examined under another procedure of international investigation or settlement. The author affirms that, in view of their legal status, the opinion issued by the Working Group on Arbitrary Detention, its request for the author to be tried while at liberty in accordance with the rules of due process, and the press releases and letters from the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders do not constitute a procedure of investigation within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Accordingly, they are not incompatible with a decision of the Committee and do not involve a duplication of international procedures.

State party's observations on admissibility and on the merits

4.1 On 27 April 2012, the State party submitted its observations on admissibility and on the merits to the Committee, on the basis of an updated report from the Public Prosecution Service dated 9 October 2009, which had been prepared at the request of the Working Group on Arbitrary Detention.

4.2 The State party reports on the actions of prosecutors and the courts in the investigation, indictment and trial of the author for aggravated fraudulent acquisition of foreign currency, embezzlement and complicity in smuggling. It maintains that the Public Prosecution Service investigated and indicted the author for embezzlement because, in an operation involving Microstar, he, as vice-president of Banco Canarias, misappropriated several million dollars from deposits held by the Central Bank. This money, after several

transactions, ended up in a foreign bank account in the name of Cedel International Investment, a company whose shareholders included his brother and Banco Canarias, in which the author held shares. In his applications to the Central Bank, the author solemnly declared that Microstar had met all the legal requirements for processing financial transactions. The Central Bank therefore acted with trust in the author's statements.

4.3 The author's right to a defence was not restricted. He and his defence counsel had access to the documents relating to the proceedings from the beginning of the investigation in 2003 and throughout the proceedings.

4.4 The most serious of the crimes of which the author was accused carries a maximum prison sentence of over 10 years, so that, under article 251, paragraph 1, of the Code of Criminal Procedure, there is a statutory presumption of flight risk, which means that the Public Prosecution Service was obliged to apply for a pretrial detention order. Moreover, the author had the financial resources to leave the country at any time. Given his financial situation and his connections with financial institutions, he could have persuaded his fellow suspects, witnesses, victims or experts to give false testimony in court. The author exercised his right to appeal against the decision by Court No. 39 to extend his pretrial detention, but this decision was upheld by the Appeal Court on 13 May 2007.

4.5 On 7 May 2009, the Supreme Court allowed the author's request for cognizance in relation to the charge of embezzlement and declared null and void the proceedings related to that crime on the grounds that he had not been properly charged. However, it maintained the effects of the indictment of 26 March 2007 on charges of fraudulent acquisition of foreign currency and smuggling by simulating the importation of goods, as well as the pretrial detention order. The author's appeal against the order was rejected by the Appeal Court on 13 March 2007. The extension of the author's pretrial detention by 2 years was requested by the Public Prosecution Service under article 244 of the Code of Criminal Procedure and was granted by Court No. 27 on 4 June 2009. The action of the Supreme Court demonstrates its respect for judicial guarantees and shows that the author's rights were not infringed, especially since, contrary to the court's finding, the author was informed by the Attorney-General's Office that the investigation into him covered the alleged offence of embezzlement, as is clear from the record of the preliminary hearing held by Court No. 3 on 9 February 2007.

4.6 With regard to the courts' alleged lack of impartiality, the State party indicates that, by law, the same control court decides on the admissibility of the charges, admits the evidence and issues the order for a trial. However, this does not imply any conclusive evaluation of either the evidence or the accused's criminal liability. Thus the right to be tried by an impartial tribunal is not affected.

4.7 The delay in the proceedings was due to the interruption of the oral proceedings after the decision on the author's request for cognizance by a higher court, since all proceedings prior to that decision were nullified and a new trial had to begin. In his defence, the author filed every possible ordinary or special appeal against the decisions taken in the course of the proceedings. For example, the preliminary hearings scheduled by Court No. 3 for 9 May and 7 June 2007 were postponed at his request. He filed four appeals in 2009: one against the charges brought by the Public Prosecution Service, on the grounds that they were untimely; one against the decision to extend his pretrial detention; one against the ruling that his objection to the control judge was inadmissible; and one against the order to freeze his assets.

4.8 On 4 November 2009, Mr. G.A., a co-defendant who was accused of being an accessory to the crime of embezzlement, was convicted by court No. 39 to 6 years' imprisonment. He admitted the charges brought by the Attorney-General's Office. His conviction directly implicated the author in the crime, since the complexity of the

fraudulent financial transactions meant that the author, as well as CADIVI officials, must have been involved.

4.9 On 20 October 2009, the Supreme Court admitted the application for *amparo* submitted by the Attorney-General's Office on 15 October 2009, in relation to the Appeal Court's decision to reduce the extension of pretrial detention to 8 months. This meant that the effects of that decision were suspended, and the Supreme Court ordered the court of first instance hearing the main case to refrain from taking any action to execute the decision pending the outcome of the application for *amparo*. However, Court No. 31, under Judge M.L.A., ignored the express order of the Supreme Court and unlawfully modified the pretrial detention order, replacing it with a decision to release the author, in a hearing at which the prosecution was not represented.

Author's comments on the State party's submission

5.1 On 22 May 2012, the author submitted his comments on the State party's submission. He points out that the State party's submission consisted of a report prepared for the Working Group on Arbitrary Detention and did not mention the information submitted to the Committee by the author, and that it basically addressed the author's possible criminal liability even though this point is not under consideration. He also maintains that, since the State party did not object to the admissibility of the communication, it should be assumed that the State party accepted that it was admissible.

5.2 With regard to the alleged violations of articles 9, paragraph 3, and 14, paragraph 3 (c), he reiterates that his trial was prolonged beyond a reasonable period of time and that this delay cannot be explained solely by the complexity of the case or investigation; that it cannot be attributed to the author; and that the State party has not explained how the right to a trial within a reasonable time was observed in the proceedings. In particular, he argues that in the year and a half it took the Supreme Court to hear his request for cognizance, which was admitted on 17 June 2008, the criminal proceedings against him were suspended, with no judge to officiate over them or monitor his detention. Moreover, the first paragraph of article 251 of the Code of Criminal Procedure violates article 9, paragraph 3, of the Covenant and the principle that pretrial detention should be the exception not the rule, in that it establishes the general assumption that there is a risk of flight in the case of any crime that carries a prison sentence of 10 years or more. In any case, his detention was arbitrary in that, for the detention order to be carried out, the requirements of article 250 of the Code of Criminal Procedure had to be satisfied, namely, there must be well-founded evidence of involvement in a crime. In his case, no evidence was produced that would justify his detention.

5.3 The decision of 10 December 2009, which changed the pretrial detention order to a summons, was lawful. A request to modify a pretrial detention order is not subject to the requirements and formalities of a preliminary hearing and can be heard without having a representative of the prosecution present or holding a hearing. The judge's decision was handed down in accordance with article 264 of the Code of Criminal Procedure, which provides for a review of the need for a custodial measure and the possible replacement of that measure with a less oppressive measure where there has been a change in the circumstances that originally justified the custodial measure. Moreover, the judge based her decision on the fact that the detention had been declared arbitrary by the Working Group on Arbitrary Detention.

5.4 The author claims that the international arrest warrant requested by the State party from INTERPOL in respect of a group of bankers that included the author was subsequently withdrawn by the latter under article 3 of its Constitution and General Regulations, on the grounds that the request was politically motivated.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that in its Opinion No. 10/2009, adopted on 1 September 2009, the Working Group on Arbitrary Detention found the detention of the author to be arbitrary. The Committee recalls its jurisprudence to the effect that article 5, paragraph 2 (a), of the Optional Protocol applies only when the same matter that is before the Committee is being examined under another procedure of international investigation or settlement. As the Working Group on Arbitrary Detention had already concluded its consideration of the case before the present communication was submitted to the Committee, the Committee will not address the issue of whether consideration of a case by the Working Group is “another procedure of international investigation or settlement” under article 5, paragraph 2 (a), of the Optional Protocol. Consequently, the Committee considers that there are no obstacles to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As for the exhaustion of domestic remedies, the Committee notes that the complaints submitted by the author under articles 9 and 14 of the Covenant relate to the proceedings against him, which have been in the investigation phase since the author was indicted by the Attorney-General’s Office in 2005. Since the issue of the exhaustion of domestic remedies is intimately linked to the substantive issues, the Committee considers that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

6.4 The Committee takes note of the author’s allegations concerning article 14, paragraph 3 (a) of the Covenant that he was not promptly informed of the charges of which he had been accused and that the formal indictment issued by the Attorney-General’s Office before Court No. 3 did not give details of the charges against him. He also claims that the second indictment by the Attorney-General’s Office, for embezzlement, on 26 and 27 May 2009 — i.e. after the judge had declared the entire proceedings up to that point null and void — suffered from the same lack of detail and contained no new facts. The Committee notes that the author challenged the legality of these acts before the courts and that as a result, on 7 May 2009 the Supreme Court ruled that the author had not been properly charged for embezzlement and annulled the proceedings related to this offence. In view of this decision, the Committee considers that the author’s complaint was properly dealt with by the authorities of the State party and that, consequently, his submission to the Committee is unfounded. The Committee therefore considers that this complaint is inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the right to have adequate time and facilities for the preparation of his defence (art. 14, para. 3 (b)), the Committee takes note of the following allegations made by the author: that on 16 March 2007 Court No. 3 refused his request to review his file in person; that he was not charged in due form with the offence of embezzlement, in violation of his right to a defence; that the Attorney-General’s Office did not make available to the court or the author a report it had received from the Ministry of the Economy and Finance which apparently concluded that the source of the foreign currency was a third party unconnected to Banco Canarias; and that his lawyers did not have full access to the documentation needed for his defence. Nevertheless, the Committee considers that the author, who had legal assistance throughout, has not provided detailed information on how

the preparation of his defence was obstructed or hindered and how access was denied to decisive evidence. Consequently, the Committee considers that this complaint has not been sufficiently substantiated for the purposes of admissibility either, and declares that it too is inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers, therefore, that the author has sufficiently substantiated his claims under articles 9 and 14 paragraphs 1, 2 and 3 (c) of the Covenant, for the purposes of admissibility. The other admissibility requirements having been met, the Committee considers the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the allegations in respect of article 14, paragraph 1, of the Covenant, the Committee notes that, according to the author, the judicial authorities who heard the case were not independent because the State party has imposed a system of provisional judges who are not secure in their positions and who can be removed at will without any predefined procedure; and that those who do not follow instructions from the executive branch are subject to reprisals. The Committee also takes note of the author's claims that the judges and prosecutors in his case were provisional, and that the judge presiding over Court No. 31, Ms. M.L.A., who ordered his release, acted in accordance with the law and, in retaliation, was arrested without a warrant immediately after doing so. The Committee also takes note of the State party's arguments that the judicial authorities responded to the author's appeals, such as his request for cognizance by a higher court, and that the judge presiding over Court No. 31 was arrested for defying the Supreme Court order which, in the context of the application for *amparo* submitted by the Public Prosecution Service on 15 October 2009, suspended the effects of the judgement reducing the extension of the pretrial detention to 8 months.

7.3 The Committee notes that the State party does not contest the provisional status of the judicial authorities involved in the proceedings against the author. The Committee also notes that the judge presiding over Court No. 31 was arrested on the same day as she ordered the release of the author and that on the following day the President of the Republic referred to her in the media as a "bandit" and suggested that she should be severely punished. The Committee recalls that States should take specific measures to guarantee the independence of the judiciary, protect judges from any form of political influence, and establish clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and for disciplinary sanctions against them. A situation where the functions and competencies of the judiciary and the executive branch are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.⁴ The Committee finds that the arrest of the judge presiding over Court No. 31 suggests a possible link with the wishes of the executive branch, in view of the public statements made by the President of the Republic in relation to the arrest, especially as the grounds for modifying the author's detention order referred to the opinion of the Working Group on Arbitrary Detention. In view of this, together with the provisional nature of the judicial authorities involved in the proceedings against the author, the Committee concludes that in the case at

⁴ See the Committee's general comment No. 32 (2007) on the right to equality before the courts and to a fair trial (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I [A/62/40 (Vol.I)] Annex VI), para. 19.

hand the State party violated the independence of the judicial bodies involved and article 14, paragraph 1, of the Covenant.

7.4 With regard to the possible violation of article 14, paragraph 2, the Committee notes the author's claim that his right to be presumed innocent was not respected, since he was deprived of his liberty as a preventive measure even though none of the legal requirements for this action were satisfied, and that the proceedings against him were politically motivated. The Committee also notes that, after the author's release had been ordered, the President of the Republic called him a "bandit" on national radio and television and insinuated that his release had been illegally coordinated by his lawyers and the judge presiding over Court No. 31. The Committee has received no refutation or explanation of the President's statements from the State party. In this connection, the Committee recalls that the denial of bail does not affect the presumption of innocence. In general, all public authorities have a duty to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.⁵ Consequently, as no judgement had been made as to the criminal liability of the author, the Committee considers that the direct reference to the author's case by the President of the Republic, and the form it took, violated the principle of the presumption of innocence, as set out in article 14, paragraph 2, of the Covenant, which applies to every accused person in the absence of a judgement to the contrary.

7.5 With regard to the author's claim in respect of article 14, paragraph 3 (c), that he was not tried within a reasonable time and without undue delay, the Committee takes note of the State party's arguments that it cannot be held responsible for the delay in the trial; that the trial was delayed because the author's request for cognizance by a higher court was found to have merit by the Supreme Court, resulting in the annulment of the proceedings related to the charge of embezzlement; and that both the author and the Public Prosecution Service, in exercising their rights and meeting their obligations, made use of all available remedies to challenge various measures taken in the course of the proceedings.

7.6 The Committee notes that the author was charged for the first time in 2005, formally indicted in March 2007 and held in pretrial detention from 8 February 2007 to 10 December 2009. When the communication was submitted, on 9 March 2010, no judgement had been made regarding his possible criminal liability, as the proceedings were at the stage of the preliminary hearing. The Committee also notes that the hearings were repeatedly suspended because no representative of the prosecution was in attendance, and because the author's request for cognizance by a higher court, submitted on 19 November 2008, was admitted by the Supreme Court seven months later, on 17 June 2008, and ruled upon 18 months later, on 7 May 2009.

7.7 The Committee recalls that the reasonableness of the delay in a trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities.⁶ In the circumstances of this case, the Committee is of the view that the State party's observations do not adequately explain how the delays in the proceedings can be attributed to the conduct of the author or the complexity of the case.⁷ Consequently, the Committee considers that the proceedings against the author suffered from undue delay, contrary to the provisions of article 14, paragraph 3 (c), of the Covenant.

⁵ Ibid., para. 30.

⁶ Ibid., para. 35.

⁷ See communication No. 1887/2009, *Juan Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 10.3.

7.8 With regard to the alleged violations of article 9 of the Covenant, the Committee takes note of the author's claim that the pretrial detention order issued by Court No. 3 was arbitrary because it did not meet the requirements established by law; that he was not informed immediately of the charges against him which motivated his arrest; and that he did not have access to a rapid judicial review of the legality of his arrest within a reasonable period. Moreover, on completion of the maximum 2-year period of pretrial detention, on 8 February 2009, he was not released even though there were no serious grounds for refusing to do so and no formal decision in that respect. The decision to extend his detention, taken by Court No. 27 on 4 June 2009 and amended by the Appeal Court on 8 October 2009, had no basis in law. The Committee also takes note of the State party's arguments that the author, thanks to his business position and financial situation, could easily have fled; that the Attorney-General's Office was required by law to apply for a pretrial detention order, under article 251, paragraph 1, of the Code of Criminal Procedure, since there is a presumption of flight risk in cases where the offence of which the accused is charged carries a prison sentence of 10 years or more, as in the author's case; and that the author had access to all means of defence with which to challenge this measure.

7.9 The Committee notes that on 8 February 2007, when he learned that the Attorney-General's Office had ordered his pretrial detention, the author presented himself voluntarily to the authorities, who placed him in pretrial detention on the basis of the order issued by Court No. 3. On 13 March 2007, the Appeal Court dismissed the author's appeal against that measure. On 19 November 2007 the author filed a request for cognizance before the Supreme Court, which, after 17 months, was declared to be admissible in part on 7 May 2009. The Committee also notes that the maximum legal period of pretrial detention expired on 8 February 2009. However, the author was not released and, even though the law itself provides for the possibility of extending the detention where there are serious grounds for so doing, the order to extend it was not issued until 4 June 2009. The measure was modified on 10 December 2009, when the author was released, partly thanks to the opinion adopted by the Working Group on Arbitrary Detention. However, on 18 December 2009 the measure was revoked and the author was ordered to be detained again.

7.10 The Committee recalls that pretrial detention should be the exception and as short as possible.⁸ Also, pretrial detention must not only be lawful but also reasonable and necessary in all circumstances, for example to prevent flight, interference with the evidence or repetition of the crime.⁹ In the light of the information provided, the Committee considers that the State party has not given sufficient reasons, other than the mere assumption that he would try to abscond, to justify the initial pretrial detention of the author or its subsequent extension; nor has it explained why it could not take other measures to prevent his possible flight or why the detention order was not extended until months after the 2-year period had expired. Although it is true that in the end the author fled the country in spite of the arrest warrant issued by Court No. 31 on 18 December 2009, the Committee notes that it was the irregularities in the proceedings that prompted his flight, as recounted above. The Committee therefore concludes that the pretrial detention of the author violated article 9 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

⁸ See the Committee's general comment No. 8 (1982) on the right to liberty and security of persons (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 [A/37/40] Annex V*), para. 3.

⁹ See communications No. 305/1988, *Hugo van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2 and No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.1.

information before it discloses a violation by the State party of articles 9 and 14, paragraphs 1, 2 and 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) if the author faces trial, ensuring the trial affords all the judicial guarantees provided for in article 14 of the Covenant; (b) assuring him that he will not be held in arbitrary detention for the duration of the proceedings; and (c) providing the author with redress, particularly in the form of appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**GG. Communication No. 1945/2010, *Achabal Puertas v. Spain*
(Views adopted on 27 March 2013, 107th session)***

<i>Submitted by:</i>	María Cruz Achabal Puertas (represented by counsel, Mr. Jaime Elías Ortega)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	2 November 2010 (initial submission)
<i>Subject matter:</i>	Torture in the course of incommunicado detention
<i>Procedural issues:</i>	Matter already being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment; right to an effective remedy
<i>Articles of the Covenant:</i>	7; 2, paragraph 3
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2013,

Having concluded its consideration of communication No. 1945/2010 submitted to the Human Rights Committee on behalf of Ms. Maria Cruz Achabal Puertas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all the written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Maria Cruz Achabal Puertas, a Spanish national born on 16 October 1961. She claims to be the victim of a violation by Spain of her rights under article 10, paragraph 1, of the Covenant. She is represented by counsel.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ The Optional Protocol entered into effect for Spain on 25 April 1985. At the time of ratification Spain made the following reservation: "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any

The facts as presented by the author

2.1 At around 2.30 a.m. on 7 June 1996, a group of approximately 15 police officers went to the author's home in Bilbao and, following a thorough search, arrested her on suspicion of belonging to an armed group. She was driven to the La Salve police station where they took her fingerprints, photographed her and took away her possessions. The same night, she was driven to the Civil Guard Headquarters in Madrid. In the course of the journey, during which she was crouched and blindfolded, she was punched and subjected to threats including that of enforced disappearance. On arrival, they made her pass through a kind of tunnel in which they began to beat her about the head, making such comments as "You're not leaving here alive" and "You've reached the end". The author remained blindfolded until she arrived at a prison cell. Some minutes later they put a black hood on her head and she was taken to a room where, with shouting and shoves, several police officers put pressure on her to confess.

2.2 There were several interrogation sessions of this sort, in which she received blows to the head, was insulted and threatened with sexual abuse, interspersed with brief periods in a cell. On one occasion, she was subjected to an attempted rape, which caused her to lose consciousness. After a while and still wearing the hood, she was taken to a forensic medical examiner, having been threatened beforehand not to speak of the treatment that she had received. On her return to the cell, she was told that her husband had been arrested and that he had already made a statement. Back in the interrogation room, they told her that her daughter had been arrested and that she was on the same premises and was going to be questioned. Pressure was placed on the author, to the point where they made her believe that her daughter was in the cells and she even believed that she could hear her crying and could see black t-shirts and a pair of shorts similar to ones belonging to her daughter. They also told her that they were going to sexually abuse her daughter. She was taken to see the medical examiner a second time, whom she told she had suffered a panic attack and had experienced difficulty breathing. The pressure with regard to her daughter and the interrogation continued, with the result that the author answered the officers' questions in the way they wanted her to. She was given some pages to read and told that they would form her statement, incriminating the persons named in them. Later they told her that she was to make her statement before a court-appointed lawyer and that, if she did not read the statement as written or if she reported her ill-treatment, her daughter would pay the consequences. When they told her this, they half opened a door so that she could see the black shoes and trousers similar to those belonging to her daughter and she thought she could hear her daughter crying. This is how she made her first statement before a person they told her was a court-appointed lawyer, another person who took notes, another who asked her questions and one other person. The insults and threats continued after this session and the author was taken to see the forensic medical examiner again, whom she told she continued to suffer severe panic attacks.

2.3 Following further interrogations in the presence of another court-appointed lawyer and more threats, she was taken to the National High Court. There, she endorsed her statements and did not report the torture she had suffered. From there she was transferred to Carabanchel Detention Centre where she was held until February 1997. During her time in the Centre, the medical services noted that she suffered from panic attacks, nightmares and night terrors and was exhibiting signs of gradual deterioration. On 11 February 1997, she was transferred to Nanclares de la Oca Detention Centre. Medical reports from this prison state that she suffered from panic attacks, anxiety, tachycardia and difficulty sleeping and

communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

on several occasions during these panic attacks she recalled what had happened in the police station.

2.4 Owing to her deteriorating health, in April 1997 she was admitted to Santiago Apóstol Hospital in Vitoria-Gasteiz, where she stayed for several weeks and was diagnosed with post-traumatic stress disorder and severe depression. A psychiatric report produced by the hospital, dated 2 May 1997, states that, *inter alia*, “she has suffered a number of panic attacks during her hospitalization ... which have ended in fainting episodes ... These episodes appear to have been triggered by stimuli that reminded her of her trauma, such as being led through a basement corridor to the radiology department, being asked to tell us about the events that triggered these episodes or receiving certain visits/news”. The report concludes: “even though we have only her testimony as evidence, given the consistency of her account and the objective assessment of her symptoms when she was admitted, we rule out the possibility that the disorder is simulated. She is suffering a series of continual stresses that remind her of her trauma, such as her time in prison and custody, which have led to the self-perpetuation of her symptoms ... The absence of a personality disorder or a previous psychiatric history is also noteworthy, although it is probable that the problems that the patient has suffered (economic and family problems and difficulties in her everyday life and her work ...) have acted as predisposing factors with regard to her current disorder.”

2.5 On 13 June 1997, the author was released on bail. In July 1997, she was examined at the Ercilla Mental Health Centre in Bilbao. On 4 November 1997, Dr A.C.A., the Director of the Centre, produced a report in which he wrote that the author had no previous personal psychiatric history but was suffering from chronic post-traumatic stress disorder owing to her detention in June 1996 by the Civil Guard. The report states that “the patient’s psychological suffering is consistent with the testimony described and with the logic of abuse, painting a sinister picture, both in the present as in the future, since her emotional balance and interpersonal relations have been affected (she virtually communicates only with her daughter). The patient is in despair and socially withdrawn, needs constant company and is incapable of attending to her own needs without help. This indicates a significant deterioration in the most important areas of a person’s life”. The report also states that “any statement given under the conditions described in the patient’s account must be considered tainted, owing to its origin”.

2.6 In November 1997, on the recommendation of Dr. A.C.A., the author was admitted to the Zaldibar Psychiatric Hospital, where the medical team confirmed the previous diagnosis. This was set out in a report sent by Dr. D.A.T., a psychiatrist at the hospital, to the National High Court in December 1997, in connection with the proceedings against the author. When asked by the Court what had triggered off the chronic post-traumatic stress disorder from which the author was suffering, the report responded that it was “being detained and living in fear for her physical safety”. In answer to the question whether there was any medical reason that might explain why the author had not made known to the legal authorities the ill-treatment that she claimed to have suffered, the report said that “the very pathology unleashed by the incident may be a sufficient reason to explain why she did not report the incident at the outset”.

2.7 In the ruling 27 January 1998, the author was acquitted by the National High Court of the crime of collaborating with an armed group, with which she had been charged. According to the ruling, the Court “does not consider the charge brought by the Public Prosecution Service to be justified on the basis of the police statement alone, taking into account the psychological state of the author at the time of making the statement, in the light of the evidence given by experts in the oral trial”. The judgement also showed that, prior to her detention, the author had lived a normal life and worked on a drug addiction project for Arrigorriaga local council. During her statement as an accused person, she

reported the ill-treatment she had suffered at the police station, claiming that she had not reported it before the court for fear of possible reprisals on the part of the same police officers.

2.8 The author stayed in hospital until March 1998, where she continued her psychiatric treatment and psychological therapy. She continues to receive treatment today, the disorder having become chronic. She claims that her state of health remains the same today, she is still unable to work and she suffers constant flashbacks.

2.9 On 18 October 2000, the author lodged a criminal complaint for the crimes of torture and assault against the Civil Guard officers who were allegedly responsible. In the course of the preliminary investigation, a number of pieces of evidence were submitted. The author considers the report produced by the forensic medical examiner of the Forensic Medical Clinic in Bilbao, Dr. G.P.L., submitted on 22 February 2002 by court order, to be of particular relevance. This report states that the author "suffers from post-traumatic stress disorder incidental to having undergone inhuman and degrading treatment, which included physical and psychological violence, during police detention in 1996. In spite of the passage of time, the disorder is still present and active in all its manifestations". The report also states that the author "did not suffer from any psychiatric disorder or personality deviation prior to the detention by the police, which may be related to the disorder exhibited post-detention". Furthermore, it states that "the post-traumatic stress disorder derives from her living through the psychologically traumatic situation described in her claim". In his legal statement, Dr. G.P.L. fully stood by his report. Three other doctors who had treated the author made statements and the reports mentioned above were submitted to the court.

2.10 At the request of the prosecutor, a report was commissioned from a forensic doctor from Madrid, Dr. E.F.R. Without having examined the author, this doctor claimed that he could not confirm what event could have triggered the alleged post-traumatic stress disorder. In July 2002, the author requested that the doctor who had treated her in Zaldibar hospital should be required to make a statement. Although she was the only psychiatrist to have treated the author, she had not been called; and the same applied to the primary care physician and the psychologist who monitored her. However, this request was not granted.

2.11 On 26 August 2002, investigating judge No. 28 of Madrid issued an order to close the case. The order stated that there was no objective information to support the claim that the author had suffered ill-treatment during the hours in which she was detained at Civil Guard headquarters under the authority of the National High Court; that none of the three lawyers who had assisted her during her detention had observed any signs of physical ill-treatment, nor had she told them anything about it; and that there was not objective information confirming that such ill-treatment had occurred. It was therefore impossible to establish a causal link with the author's illness.

2.12 The author lodged an application for reconsideration with subsidiary appeal against the order, maintaining that the psychiatric reports were consistent with her statement and were thus *prima facie* evidence with sufficient substance to continue with proceedings. She also stated that it should be the Provincial High Court that should conduct oral proceedings to determine whether there was sufficient evidence. The application for reconsideration was rejected on 11 October 2002. On 21 May 2003, the Madrid Provincial High Court dismissed her appeal and confirmed the decision. The Court considered that the author's statement and the forensic medical reports did not prove that the ill-treatment that was the subject of her case had taken place. The author points out that the proceedings before the examining court did not require proof to be adduced that she had suffered ill-treatment, since the Criminal Procedure Act requires only the existence of sufficient *prima facie* evidence to move on to oral proceedings.

2.13 On 23 June, the author lodged an application for reconsideration before the Constitutional Court. In this application, she maintained that her statement, which was consistent and free of contradictions, together with the numerous medical reports certifying chronic post-traumatic stress disorder, provided sufficient evidence to justify oral proceedings in accordance with due process of law, which would have provided an opportunity to clarify the alleged events. On 12 January 2005, the Constitutional Court issued an order dismissing the application for *amparo* on the grounds that it demonstrably lacked content that would justify a decision on its merits.

2.14 On 11 July 2005, the author lodged an application with the European Court of Human Rights, alleging a breach of article 3, independently and in relation to article 1 of the European Convention on Human Rights, for a lack of effective investigation into her claim of torture. On 13 May 2008, the author received a letter from the Court informing her that a committee of three judges had decided to declare the application inadmissible, since they did not find “any appearance of violation of the rights and freedoms guaranteed by the Convention and its Protocols”.

2.15 The author claims that the Court based this decision on appearances alone and, in not granting the application, failed to recognize the merits of the case. There is consequently no reason for the present communication not to be reviewed by the Committee.

2.16 The author has provided the Committee with a copy of the medical reports mentioned above and stresses that all the psychiatrists who treated her belong to official bodies (detention centres, the Basque Health Service and medical forensic clinics). None of them were private.

The complaint

3.1 The author states that the events described constitute a violation of article 10, paragraph 1, of the Covenant, in that she was tortured while held in incommunicado detention on 7, 8 and 9 June 1996. She maintains that if she had not been put into incommunicado detention, the Civil Guard officers would not have acted with the degree of impunity that they did and the events described could have been avoided. Restricting a detainee’s right to be assisted by a trusted counsel, which entails the possibility of a private meeting, or at least communicating to the detainee’s family that there is such a possibility, creates a sense of depression in the detainee and impunity in the police officers concerned, and gives rise to situations with extremely serious consequences, as in the present case. In this connection, the author recalls the recommendations by the Committee and the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that Spain should abolish incommunicado detention.

3.2 The author states that the Spanish courts prevented a fair trial on the acts of torture. In the absence of a conviction, she has not had access to what is claimed to be the material responsibility of the State. Through the present communication, her objective remains the same. Most importantly, she seeks a declaration that she was tortured and, as a result, that she will receive indemnification. She therefore requests that the Committee should declare the incompatibility of incommunicado detention, which is governed by articles 520 bis and 527 of the Criminal Procedure Act, with article 10, paragraph 1, of the Covenant. She maintains that the regime of incommunicado detention constitutes an obstacle to efforts to eradicate torture in Spain.

State party’s observations on admissibility

4.1 On 7 July 2010, the State party submitted its observations on admissibility, maintaining that the communication should be declared inadmissible. It asserts that the

author lodged an appeal concerning the same events before the European Court of Human Rights in July 2005, claiming that her rights had been violated under article 3 of the European Convention on Human Rights, both independently and in relation to article 1, owing to the lack of an effective investigation into her complaint by the Spanish courts. The author states that, since the appeal was dismissed, the issue has not been considered by any international court. The State party does not share this view. Even disregarding her appeal and its dismissal, decisions on inadmissibility should, under article 35 of the Convention, be based on the Court's evaluation of the merits ("the appeal is incompatible, with the provisions of the Convention or the Protocols thereto, manifestly ill-founded or an abuse of the right of application"). The rejection of an appeal on the grounds that it is manifestly ill-founded concerns not the mere external formalities or the observance of procedural rites but the material substantiation of a claim. Rejection implies a review by the same court and such a review means that the same issue cannot be brought before the Committee. This is the case envisaged in rule 96 (e) of the Committee's rules of procedure.²

4.2 With regard to the author's request that the Committee should order the State party to redress the damage suffered and declare the regime of incommunicado detention incompatible with the Covenant, domestic remedies have not been exhausted. There are separate channels in place for claiming compensation for damage caused by the actions of the public authorities or by the courts, which are independent and compatible with acquittal on any criminal charges that may have been brought against officials of those bodies. With regard to public administration, this matter is governed by Act No. 30/1992, which extends criminal liability farther than simply the perpetration of offences by officials or employees. Any injury caused by the normal or abnormal functioning of public services confers the right to indemnification. The author's filing of a criminal case did not prevent her prosecuting the State for causing injury, so long as its existence could be proved and there was a causal link with the functioning of public services. Consequently, it concurs with the criterion for inadmissibility provided for under article 96 (f) of the Committee's rules of procedure.

4.3 With regard to the possible non-compliance with the Constitution of procedural norms relating to incommunicado detention, as breaching the prohibition of torture or degrading treatment, the author did not bring the matter before the courts. Consequently, her complaint should be declared inadmissible, in accordance with article 96 (f) of the rules of procedure.

State party's observations on the merits

5.1 On 28 April 2011, the State submitted its observations on the merits. It points out that, notwithstanding her release in June 1997 and her acquittal in January 1998, the author did not submit a complaint regarding her treatment until 18 October 2000. Subsequently, the order dated 26 August 2002 under which investigating judge No. 28 of Madrid set the case aside states that there is no *prima facie* evidence to support the assertion that the alleged events took place. Also, it states that none of the lawyers who assisted the author during the course of her detention observed any signs of physical ill-treatment and she herself did not report this, "when it seems logical, in the circumstances, that the victim would have made the ill-treatment known to her lawyer and the investigating judge before whom she appeared; when questioned on the way that she had been treated, she responded only that she had not been hit".

5.2 In the course of the proceedings, a number of inquiries were conducted, in particular medical forensic inquiries. With regard to these, the judge states that, while it is recognized

² See footnote 1 for the text of the reservation.

that the author suffers from post-traumatic stress disorder following her detention and time in prison, “there is no objective information confirming that she suffered ill-treatment during detention; it is therefore impossible to establish a causal link between ill-treatment and her illness ... The mere fact of detention, in any circumstance — in this case for allegedly belonging to the terrorist group *Euskadi Ta Askatasuna* (ETA) — followed by imprisonment, causes or can cause a person to become unbalanced and develop “a psychological personality disorder.” The order, in setting the case aside, does not affect any civil proceedings to obtain the appropriate indemnification for damage and harm that the author may have suffered.

5.3 In its ruling rejecting the appeal, the Madrid Provincial Court concluded that “there is no evidence to suggest a logical and chronological connection between the particular situation alleged to have taken place on or around 14 June 1996 and the medical assistance provided later at the detention centre where the complainant was admitted, because the prison medical services were not informed until 18 June 1996 of the anxiety suffered on the first date, 14 June 1996, although it came to light as a result of her detention”. With regard to the application for *amparo*, the Constitutional Court concluded that, in view of the many medical inquiries that had been undertaken, it was not convinced by the arguments put forward by the author regarding the relevance of the evidence that she requested, so it was not included in the Court’s final judicial decision.

5.4 Meanwhile, the application to the European Court of Human Rights was deemed inadmissible by the decision of a committee of three judges. This does not represent an unthinking or superficial decision but was made on the basis of a thorough examination of the facts. The letter informing the author of the decision states that the Court “does not observe any appearance of violation of the rights and freedoms guaranteed by the Convention or its Protocols”. Furthermore, although the case before the European Court ended on 13 May 2008, the author did not apply to the Committee until November 2009. This, added to the time that has passed since the decision of the Constitutional Court (almost five years) and the fact that the author waited almost three years to report the alleged ill-treatment to the domestic courts, calls into question the seriousness and substance of the present communication.

5.5 The author was arrested and placed in incommunicado detention for a period of just over 72 hours, after which she was detained in prison. From the perspective of article 7 of the Covenant, what is relevant is whether the medical condition observed during detention and pretrial detention over almost 15 months is a normal (although undesirable and unfortunate) consequence of this experience or whether it is the result of having been subjected to ill-treatment. The cause of the disorder was not determined clearly in the course of the legal investigation, despite the fact that numerous medical tests were conducted. Neither is new information included in the present communication that might lead to an alternative conclusion. While some of the medical reports lend credibility to the author’s version, others contradict it, or at least, indicate that other possibilities cannot be ruled out. Thus a report by Dr. E.F.R., a psychiatrist at the forensic medical clinic of the Ministry of Justice, produced at the request of investigating judge No. 28, notes that “a causal link between the allegation and the psychologically traumatic experience in question cannot be established, as the information provided by the informant is unsupported by objective data and we are unable to ascertain the truthfulness of this account. ... This post-traumatic stress may be due to multiple life stress factors and this expert cannot, in the light of the available diagnoses, categorically confirm which of them could trigger the alleged post-traumatic stress disorder. ... Detention alone could, in the circumstances and without the need for any ill-treatment, followed by imprisonment, lead to an adaptive disorder

exhibiting elements of post-traumatic stress disorder in which her detention, followed by imprisonment, could have acted as life stress factors.³

5.6 The claim of torture was submitted almost three years after the events allegedly took place, which objectively makes it difficult to effectively investigate. Nevertheless, the investigation identified all the Civil Guard officers who had had contact with the author. They were questioned; witness statements were taken from all the court-appointed lawyers who had had contact with the author during her detention, and from the forensic doctors who had examined her; and numerous medical reports on the author's state of health were included in the proceedings. These investigations served to prove the existence of a post-traumatic stress disorder. However, all the action taken, such as the taking of statements from independent lawyers who had assisted the author and from the forensic doctor, did not provide any circumstantial evidence that could justify the continuation of criminal proceedings with the opening of an oral trial. Although the theory that the author's disorders were a consequence of her detention and pretrial detention was acknowledged, there is reason to think that they are a consequence of the author's procedural situation and her arraignment on a serious criminal charge and not related to irregularities in her detention and pretrial detention.

5.7 With regard to the author's request for indemnification, the State party considers that this request extends beyond the Committee's mandate to consider individual communications. It reiterates that the author did not attempt to obtain any form of indemnification before the Spanish courts, in spite of the fact that the law provides for a specific procedure for cases of persons held in pretrial detention and later acquitted. There is an impartial system of material responsibility in place, which also includes compensation for moral damage and in which it is not necessary to prove that ill-treatment or torture has occurred.⁴ Therefore, the author's claim that it is not possible to obtain indemnification without the prior conviction of those responsible for torture is unfounded.

5.8 With regard to the author's complain relating to the incommunicado detention regime, the State party maintains that it is inappropriate to examine, on the basis of an individual communication, a complaint aimed at prompting an abstract, general consideration of whether a domestic legal rule is compatible with the Covenant. Moreover, incommunicado detention, which is regulated by articles 520 bis and 527 of the Criminal Procedure Act, in line with article 10, paragraph 1, of the Covenant. Such detention may be imposed only in specific cases and in a restrictive manner. Its application requires legal authorization in all instances on the basis of a substantiated and reasoned decision, which must be issued in the first 24 hours of detention. It also requires constant and direct monitoring of the detainee's personal situation by the judge who approved the detention, or the investigating judge of the judicial district where the detainee is being held. The only differences from the regular detention regime are: (a) a lawyer is appointed by the court; (b) detainees do not at any time have the right to let family members or anyone else know the reason for their detention or where they are being held in custody; (c) detainees do not have the right to a private interview with the court-appointed lawyer on the conclusion of the inquiry in which they have participated; and (d) the maximum period of detention (72 hours) may be extended by the judge. The question of duration is not significant in the case of the author, since she was arrested on 7 June and had been brought before a court by 11 June.

³ The author provided the Committee with a copy of this report.

⁴ Art. 294, para. 1 of the Judiciary Organization Act: "Persons who, having undergone pretrial detention, are acquitted on the grounds that no offence has been committed or, on the same grounds, are released by court order shall, if they have suffered harm, be entitled to compensation."

5.9 As regards the provision of legal assistance by a court-appointed lawyer rather than by a freely chosen lawyer, the aim is to strike a balance between the prevention of terrorist attacks and the protection of detainees. A court-appointed lawyer is nominated by a professional body independent of the public authorities and must hold special professional qualifications to assist persons held incommunicado, including 10 years of professional experience and proven competence in criminal law. The presence of a lawyer has the purpose of ensuring that detainees' constitutional rights are respected, that they do not suffer coercion or treatment incompatible with their dignity and freedom to testify and that they are given appropriate technical advice on their conduct during questioning, including the option of remaining silent. In any case, detainees' statements to the police lack evidentiary value in themselves. Once the incommunicado period has ended, detainees regain the right to choose their own lawyer.

5.10 The State party asserts that the legal rules applied to the author have since been amended and a general reform of the incommunicado regime is under consideration within the framework of the reform of the Criminal Procedure Act. Thus, a reform of November 2003 allows a person held incommunicado to request to be seen by a second forensic medical examiner appointed by the competent judge or court in order to establish the facts. Neither the judge nor the Government authorities can choose which forensic medical examiner will see a specific detainee; this is the responsibility of the doctor assigned to the court that ordered the detention.

5.11 Several of the six judges in charge of examining terrorist crimes currently allow additional guarantees in the form of recorded police interviews and additional medical supervision. These measures, which are placed on record in accordance with an order issued on 12 December 2006, have been applied to approximately 90 per cent of those detained incommunicado since then. The additional medical supervision entitles detainees to be examined by a doctor of their choice, if they so request, jointly with the forensic medical examiner, who visits the detainee every eight hours or whenever necessary. The medical examiner produces one report and the personal doctor another and both reports are submitted to the judge who will take the detainee's statement.

Author's comments on the State party's observations on the merits

6.1 On 28 July 2011, the author submitted comments on the State party's observations. With regard to the State party's argument that the author only filed a complaint three years after her release, she states that her counsel sent a letter to the court examining the case against her, in which he detailed her ill-treatment, and that, in the statement that she made before the same court on 7 January 1998, she had confirmed that the contents of that letter were correct. Furthermore, she points out that one of the medical reports that were submitted confirms that the very pathology unleashed by her experiences may be a sufficient reason to explain why she did not report the incident at the outset. Her mental state did not allow her to make the great effort required to lodge a complaint. She did not have the strength to do so until October 2000.

6.2 The author reiterates her disagreement with the statement made in the order dated 26 August 2000, closing the case, that it was impossible to establish a causal link between her possible ill-treatment and her illness. She recalls the reports submitted by independent psychiatrists, one of which, for example, states that "she exhibits a post-traumatic stress disorder incidental to having suffered inhuman and degrading treatment, which included physical and psychological violence, during police detention in 1996". The report also states that "she did not suffer from any psychiatric disorder or personality deviation prior to the police detention that could have had a bearing on the state she exhibited following her detention". The author categorically rejects the statement in the order that her psychological suffering is due simply to her detention.

6.3 With regard to the application to the European Court of Human Rights, the author states that she filed the application on 11 June 2005 and that the Court took more than three years to reach a decision. The fact that it took just over a year to bring her case before the Committee after she had been notified of the Court's decision was due to the scepticism she felt following the repeated negative decisions obtained up until that point.

6.4 The author points out that all the psychiatrists who have examined her have drawn the same conclusions. The report that the State refers to in order to claim that there was not such unanimity was produced by Dr. E.F.R., who never treated or examined her. With regard to the statements given by the police officers who are alleged to have been taken to court, they refused, in the one appearance before investigating judge No. 28, to answer the questions of the defence counsel, and the prosecution service did not even question them. The prosecution service did not participate in any of the inquiries carried out at the examination stage while the proceedings were going on. The prosecution service also failed to institute proceedings *ex officio* when, during the case brought against her by the National High Court, the author reported having suffered ill-treatment.

6.5 With regard to the claim for damages, the author says that, if it is recognized that she was tortured, the only way of minimally repairing the harm she has suffered is to pay compensation. Free, specialized medical assistance would also be of great help. She says that she is open to whatever compensation is considered to be appropriate.

6.6 Regarding the compensation procedure referred to by the State, set out in article 294 of the Judiciary Organization Act, the Act requires proof that the offence with which an individual was charged was not committed. However, it is generally impossible to prove a negative, which makes acquittal practically unfeasible.

6.7 As for her application relating to the incommunicado regime, the author claims that this is completely relevant. In spite of the Committee's recommendations, this regime, which is governed by articles 509, 520 bis and 527 of the Criminal Procedure Act, has been neither revoked nor amended. The changes referred to by the State party were made after the events of the present case.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes that the author presented an application on the same events before the European Court of Human Rights. In a letter dated 13 May 2008, the author was informed that a committee of three judges had decided to declare the action inadmissible, since it did not observe any apparent violation of the rights and freedoms guaranteed by the Convention or its Protocols. The Committee recalls that, in ratifying the Optional Protocol, Spain introduced a reservation excluding the competence of the Committee in relation to cases that have been or are being examined under another procedure of international investigation or settlement.

7.3 The Committee recalls its case law relating to article 5, paragraph 2 (a) of the Optional Protocol to the effect that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol; and it must be considered that the European Court has gone well beyond the examination of the purely formal criteria of admissibility when it declares a

case inadmissible because “it does not reveal any violation of the rights and freedoms established in the Convention or its Protocols”.⁵ However, in the particular circumstances of this case, the limited reasoning contained in the succinct terms of the Court’s letter does not allow the Committee to assume that the examination included sufficient consideration of the merits in accordance with the information provided to the Committee by both the author and the State party. Consequently, the Committee considers that there is no obstacle to its examining the present communication under article 5, paragraph 2 (a), of the Optional Protocol.

7.4 The Committee observes that the author initiated criminal proceedings for torture before a court of first instance, filed an appeal with the Provincial Court (*Audiencia Provincial de Madrid*) and an application for *amparo* before the Constitutional Court, all of which were unsuccessful. It therefore considers that domestic remedies have been exhausted. The other admissibility requirements having been met, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The author states that she was tortured while being held incommunicado from 7 to 9 June 1996, during which period she did not have the right to be assisted by a lawyer of her choice or to communicate with her family. She maintains that, as a result of the treatment she received, she suffers from chronic post-traumatic stress disorder, which has been diagnosed by several doctors from the public health system, and she continues to require treatment for this. The author also maintains that she did not have access to a fair trial after reporting the events, as the judge closed the case without providing the opportunity for an oral trial, on the grounds that there was no objective information to establish that she had suffered ill-treatment. The State party maintains that the cause of the disorder from which the author suffers was not clearly established by the judicial investigation, in spite of the numerous forensic medical examinations that were carried out, and that the disorder may be a consequence of procedural situation experienced by the author as a result of the action brought against her. The State party also maintains that none of the tests carried out produced sufficient *prima facie* evidence to continue the criminal proceedings by means of an oral trial.

8.3 The Committee recalls its general comments No. 20 (1992)⁶ and 21 (1992)⁷ regarding the relationship between articles 7 and 10, paragraph 1, of the Covenant and considers that the facts alleged by the author, fall within the scope of application of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant. The Committee will therefore examine the facts from that perspective and not under article 10, paragraph 1, which is invoked by the author.

⁵ Communication No. 944/2000, *Mahabir v. Austria*, decision on inadmissibility of 26 October 2004, paras. 8.3 and 8.4.

⁶ General comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment (art. 7 of the Covenant), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

⁷ General comment No. 21 (1992) on the humane treatment of persons deprived of their liberty (art. 10 of the Covenant), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B.

8.4 The Committee takes note of the author's detailed and consistent description of the events surrounding her arrest and detention in the Civil Guard Headquarters in Madrid. It also takes note of the medical reports that the author has submitted, in particular the reports from psychiatrists who have treated her and diagnosed the existence of chronic post-traumatic stress disorder, the origin of which is alleged to lie in the events surrounding her detention. According to these reports, her disorder has necessitated periods of hospitalization and prolonged treatment up until the present time. In the face of this evidence, the State party puts its weight behind the report of the psychiatrist from the forensic medical clinic of the Ministry of Justice, produced at the request of investigating judge No. 28, in which he claimed that he could not categorically establish the origin of the disorder solely on the basis of the medical reports referred to above. However, in the Committee's opinion, this report, a copy of which was provided by the author in the framework of the present communication and which was issued without the author having been examined by the doctor concerned, does not constitute sufficient grounds for refuting the medical reports based on the examination and direct treatment of the author. Moreover, it cannot serve to support the conclusion that events did not occur in the way the author describes. The report also maintains that the absence of objective information makes it impossible to establish a causal link between the author's disorder and the events that she describes. This prompts the Committee to address the issue of the investigation of the author's complaint by domestic courts.

8.5 The Committee observes that, in the course of the investigation by investigating judge No. 28, the Civil Guard officers who had dealt with the author, the court-appointed lawyers provided by the State during her incommunicado detention and the forensic medical examiner who examined her at that time were identified and questioned. However, the author claims that the Civil Guard officers, in the sole appearance that they made before a judge, refused to answer questions from the private prosecutor. As for the court-appointed lawyers and the forensic medical examiners, who stated that the author had not complained of ill-treatment, the Committee considers that the reasons given by the author for not informing them of the treatment to which she had been subjected are convincing, especially bearing in mind the vulnerable position in which she found herself as a result of the incommunicado regime. The Committee also observes that, during the course of the author's trial in the National High Court, the author reported the ill-treatment she had suffered while held incommunicado, but no ex officio investigation was carried out.

8.6 The Committee recalls its general comments No. 20 (1992),⁸ and No. 31 (2004)⁹ as well as its settled jurisprudence,¹⁰ according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty. In the present case, the Committee considers that the closure of the case at the examination stage, which prevented the holding of the oral trial does not meet the requirements or thoroughness that should be applied to all reports of acts of torture, and that the only inquiries conducted at the examination stage were not sufficient to examine the facts with the rigour required by the severity of the author's illness and the reports of the doctors who treated and diagnosed her. Given the difficulty of proving the existence of torture and ill-treatment when these do not leave physical marks, as in the case of the author, the investigation of such acts should

⁸ Para.14.

⁹ General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 4 (A/59/40 (Vol.I))*, annex III, para. 18.

¹⁰ See, for example, communication No. 1829/2008, *Benítez Gamarra v. Paraguay*, Views adopted on 22 Mar. 2012, para. 7.5.

be exhaustive. Furthermore, all physical or psychological damage inflicted on a person in detention — and particularly under the incommunicado regime — gives rise to an important presumption of fact, since the burden of proof must not rest on the presumed victim.¹¹ In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy and that the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7 of the Covenant, read independently and in conjunction with article 2, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which should include: (a) an impartial, effective and thorough investigation of the facts and the prosecution and punishment of those responsible; (b) full reparation, including appropriate compensation; (c) provision of free, specialized medical assistance. The State party is also under an obligation to prevent similar violations in the future. In that connection, it recalls the recommendation issued to the State party on the occasion of the Committee's consideration of the fifth periodic report that it should take the necessary measures, including legislative ones, to definitively put an end to the practice of incommunicado detention and to guarantee that all detainees have the right to freely choose a lawyer who can be consulted in complete confidentiality and who can be present at interrogations.¹²

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and ensure that they are widely disseminated.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

¹¹ European Court of Human Rights, application No. 40351/05, *Beristain Ukar v. Spain*, judgement of 8 March 2011, para. 39.

¹² Concluding observations of the Human Rights Committee on the fifth periodic report of Spain, (CCPR/C/ESP/CO/5), para. 14.

Appendix

Individual opinion of Committee members Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Yuval Shany and Mr. Konstantine Vardzelashvili (dissenting)

We are unable to agree with the admissibility decision rendered by the Committee in this case for the following reasons. When the Spanish Government acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, it did so “on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement”.

According to the Committee’s established jurisprudence relating to article 5, paragraph 2 (a) of the Optional Protocol, this condition is not fulfilled if a case has been dismissed only on procedural grounds.^a However, when the European Court of Human Rights has based a declaration of inadmissibility not solely on procedural grounds but also on reasons that include “a certain consideration of the merits of the case”, then, according to the Committee’s jurisprudence, a matter should be deemed to have been “examined” within the meaning of the reservation to article 5, paragraph 2 (a) of the Optional Protocol.^b The Committee has recognized that “even limited consideration of the merits” of a case constitutes an examination within the meaning of the respective reservation.^c The matter is considered to be the same if the contents of the European Convention, as interpreted by the European Court of Human Rights, are sufficiently proximate to the protection afforded under the Covenant.

We see no reason to depart from this long-standing interpretation in the case before us. The European Court based its inadmissibility decision on the argument that it did not find “any appearance of violation of the rights and freedoms guaranteed by the Convention and its Protocols.” We fail to see how this could be interpreted other than as an even limited consideration of the merits. Indeed, the Committee has found in previous cases that the European Court should be considered as having gone beyond the examination of purely procedural admissibility criteria when declaring an application inadmissible on these grounds.^d

The author of the communication had the choice between submitting this case either to the European Court of Human Rights or to the Human Rights Committee. Once she had lodged an application with the European Court of Human Rights alleging a breach of article 3, independently and in relation to article 1 of the European Convention, which was subsequently declared inadmissible for the lack of an apparent violation of the rights and freedoms guaranteed by the Convention, the matter has been “examined under another procedure of international investigation” pursuant to the reservation cited above. It is not

^a Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 30 April 1999, para. 6.4.

^b Communication No. 1396/2005, *Jesús Rivera Fernández v. Spain*, Decision on admissibility of 28 October 2005, para. 6.2.

^c Communication No. 944/2000, *Mahabir v. Austria*, Decision on admissibility of 26 October 2004, para. 8.3.

^d Communications No. 744/1997, *Linderholm v. Croatia*, Decision on admissibility of 27 July 1999, paras. 3 and 4.2; No. 944/2000 (footnote c above), para. 8.3; and No. 1396/2005 (footnote b above), para. 6.2.

for the Human Rights Committee to assess whether the examination of a case has been sufficiently careful under a procedure which enforces a norm affording an equivalent level of protection to that provided by article 7 of the Covenant, and which was invoked unsuccessfully by the author of a communication before the matter was brought to the Committee.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. Cornelis Flinterman and Mr. Fabian Salvioli

1. We agree with the Committee's finding that the reservation introduced by Spain on its ratification of the Optional Protocol in the particular circumstances of the case cannot be regarded as an obstacle to the examination of the merits of the communication of the author under article 5, paragraph 2 (a), of the Optional Protocol. It would have been important, however, if the Committee would have highlighted the particular circumstances of the case in more detail. This would have made it clear that the Committee would only deviate from its general respect for reservations such as made by Spain and a substantial number of other European countries and Uganda in exceptional circumstances.

2. The Spanish reservation to article 5, paragraph 2 (a), implies that the Committee is barred from the examination of a communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement, in this case the European Court of Human Rights. In the present case there is no dispute about the question of whether the communication before the Committee relates to the same matter as the complaint before the European Court of Human Rights. The main question is whether the European Court of Human Rights had indeed "examined" the case so as to give the reservation its preclusionary effect for purposes of article 5, paragraph 2 (a).

3. In this respect it is important to refer to the case law of the Committee from which it appears that the Committee does not consider the notion of "examination" of the matter in the context of reservations such as the Spanish reservation to signify "any examination" (*Lemerrier v. France*, 1228/2003). That brings us to the particular circumstances of the present case. The Committee has noted the limited reasoning contained in succinct terms in the letter of the European Court of Human Rights to the author in which she was informed that the Court had declared her application inadmissible since the Court did not observe any apparent violation of the rights and freedoms guaranteed by the (European) Convention or its Protocols. Unfortunately, the Committee leaves it at that and does not further elaborate on the peculiar circumstances of the case.

4. The Committee could have added that in this particular case the letter had been sent by the European Court of Human Rights to the author almost three years after she had submitted her application to the Court without her application having been sent to the State party for its submissions on the admissibility or merits of the case. The Committee could further have noted that in this particular case the author had lodged her application to the European Court of Human Rights alleging a breach of article 3 of the European Convention on Human Rights and Fundamental Freedoms (prohibition of torture or inhuman or degrading treatment or punishment) which is similar to article 7 of the Covenant. The material presented to the European Court of Human Rights by the author was similar to the material presented to the Committee. In such cases where the physical integrity, yes indeed the right to life, of the individual complainant has been at stake, it should be clear from the record of the (inadmissibility) decision of the European Court of Human Rights that the Court has sufficiently given attention to the merits of the case in order to constitute an examination for purposes of the preclusionary effect of a reservation, like the Spanish one, to article 5, paragraph 2(a), of the Optional Protocol. If that is not the case, the Committee may legitimately declare the communication admissible despite the reservation, like it did in the present case.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**HH. Communication No. 1957/2010, *Lin v. Australia*
(Views adopted on 21 March 2013, 107th session)***

<i>Submitted by:</i>	Fan Biao Lin (represented by counsel, Simon Leske, Asylum Seeker Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	14 July 2010 (initial submission)
<i>Subject matter:</i>	Deportation to China
<i>Procedural issues:</i>	Insufficient substantiation; inadmissible <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to life, right to protection from cruel, inhuman or degrading treatment or punishment; right to be free from arbitrary detention; right to protection from interference with the family and home
<i>Articles of the Covenant:</i>	6, 7, 9, 17 alone and read in conjunction with 2, para. 1
<i>Articles of the Optional Protocol:</i>	2; 3

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2013,

Having concluded its consideration of communication No. 1957/2010, submitted to the Human Rights Committee by Fan Biao Lin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 14 July 2010, is Fan Biao Lin, a Chinese national born on 18 May 1969. The author claims that his rights under articles 6, paragraph 1; 7; 9, paragraph 1; and 17 alone and read in conjunction with article 2, paragraph 1, of the Covenant will be violated if he was returned to China. The author is represented by counsel, Simon Leske from the Asylum Seeker Resource Centre.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

1.2 On 16 July 2010, the Chair, acting on behalf of the Committee, requested the State party not to deport the author to China while his communication is under consideration by the Committee. He noted that the request for interim measures might be reviewed once the State party's observations had been received.

1.3 On 27 October 2010, the Special Rapporteur on new communications and interim measures acting on behalf of the Committee decided, in accordance with rule 97, paragraph 3, of Committee's rules of procedure, to examine the admissibility of the communication together with its merits.

Factual background

2.1 The author is a Falun Gong practitioner and originates from Fuqing in Fujian province of China. He is married and has a son. Both his wife and son remained in China.

2.2 On 15 December 2005, the author arrived in Australia on a tourist visa. He continues to practice Falun Gong in Australia. On 4 January 2006, he applied for a protection visa under the 1958 Migration Act mentioning that he has been a Falun Gong practitioner for five years and that he feared imprisonment or losing his life in China as he would not relinquish his belief in Falun Gong. On 8 February 2006, the Department of Immigration and Multicultural Affairs refused to grant the author a protection visa for lack of a well-founded fear of persecution. The Department noted that the author did not claim to have been openly involved in the Falun Gong movement while still in China, nor did he indicate any involvement beyond being an ordinary member. It further observed that the author did not identify any personal instances of discrimination or persecution in relation to his practice of Falun Gong, nor did he indicate how he was severely physically and mentally oppressed. The Department further considered that, although the author had stated that he had practised Falun Gong for five years, he did not appear to have attracted any attention during this time, as he seemed to have lived a normal life for many years. Furthermore, the Department established that the author's ability to obtain a passport in his own name without difficulty and to depart China legally were not consistent with a claim to have been the subject of adverse attention from the authorities because of his Falun Gong profile and thus demonstrated that he was not of interest to the Chinese authorities. The Department concluded that, even if the author was involved in Falun Gong activities, his profile and level of participation were not such that he would be of interest to the Chinese authorities on his return to China, and that there was no real risk that he would be subjected to serious harm amounting to persecution under the 1951 Convention relating to the Status of Refugees.

2.3 On 24 April 2006, in the framework of an appeal to the Refugee Review Tribunal, the author's counsel transmitted a letter from the Australian Red Cross, indicating that the author suffered from mental health issues and has been diagnosed with anxiety, depression and post-traumatic stress disorder. It was stated that the author appeared confused and disoriented and might have trouble providing evidence at the Tribunal's hearing. A letter from Foundation House of 27 April 2006 confirmed the diagnosis. The Tribunal hearing was therefore postponed to enable the author to receive treatment and to allow counsel to receive proper instructions. On 29 May 2006, the author made a statutory declaration and stated that as a child he had suffered from poor health. He explained that he had first heard about Falun Gong in 1992 but only got interested in it when introduced to the practice by a friend in 1999. No one in his family is a member of Falun Gong and they are not aware of his practice as, in 1997, he moved from his village to an urban area in Fuqing and his father as a member of the Communist Party would probably be opposed to his practice of Falun Gong. Enhancing his physical condition was his main aim of practising Falun Gong. From 20 July 1999, the Central Communist Party began a nationwide crackdown against Falun Gong members by detaining, beating and torturing them. On 20 November 1999, the author

was arrested without charge by three men, two in plain clothes and one in uniform, and detained for about two months until his release thanks to a significant bribe paid by a friend. The author notes that during his detention, he experienced torture by beating, burning with cigarettes, suspension in hand cuffs with beating, denial of access to medical care, psychological torture by being told that Falun Gong was a “cult” and being forced to disclose the names of other Falun Gong members and coercion into signing a statement renouncing Falun Gong. After his release, he was threatened that if he ever practised Falun Gong again, he would suffer. With regard to his trip to Australia, the author explains that his friend organized a visitor’s visa and a passport through a travel agent because when he initially applied for a passport, it was refused. He believed that the reason for the refusal was that the authorities did not want him to leave China and were still looking for him because of the declaration he had signed in prison. He feared that if returned to China he would be re-detained and tortured as a member of Falun Gong. He feared more serious harm in the future, as he had signed a declaration saying he would renounce his membership.

2.4 On 23 June 2006, a medical report was submitted to the Refugee Review Tribunal, which stated that a cervical spine x-ray revealed that the author had no significant abnormality and a head computed tomography revealed a “normal examination”. A letter for the Australian Red Cross indicated that the author would be referred for a further neuropsychological examination. On 25 July 2006, the Tribunal affirmed the Department’s decision not to grant a protection visa. The Tribunal found that the author’s evidence lacked credibility and pointed to his contradictory claims about when he commenced the practice of Falun Gong: in his application for a protection visa he claimed to have started practising five years ago, which would be the end of 2000, while in his review application, he claimed that he commenced practice in May or June 1999. The Tribunal also noted the contradictory details regarding his employment record in China. The Tribunal concluded that it was not satisfied that “the author was ever a Falun Gong practitioner”. It further found that he was never arrested, detained, jailed or tortured by the Government of China because of his Falun Gong practice as claimed, that he was never made to sign a statement by the Chinese authorities promising not to practice Falun Gong in the future, that he was never reported to the police for practising Falun Gong in secret and that he was never refused a Chinese passport because he had been a Falun Gong practitioner as claimed. It also concluded that, while it accepted that the author had engaged in Falun Gong practice in private in Australia, he only begun practising in Australia as a means of enhancing his claim for refugee status and that there was no evidence that the Chinese authorities were aware of his limited activities or had an ongoing interest in the author.

2.5 On 6 July 2007, the Federal Magistrates’ Court of Australia reviewed the case and affirmed the original decision. The Court held that the author’s claims impermissibly urged the court to conduct a review of the merits of the decisions, a course of action which was not within its jurisdiction.¹ Questions of credibility of evidence were solely within the jurisdiction of the Refugee Review Tribunal and were not reviewable by the Court as an issue of procedural fairness unless the decision was “so unreasonable that no reasonable decision-maker could have made it”. The Federal Magistrates’ Court concluded that the Tribunal had adequately addressed the author’s claims. On 30 November 2007, the Full Federal Court affirmed the Federal Magistrates’ Court’s decision.

2.6 On 27 December 2007, the author requested a humanitarian intervention by the Minister for Immigration, Multicultural and Indigenous Affairs, pursuant to section 417 and

¹ An appeal to the Federal Magistrates’ Court from the Refugee Review Tribunal is not a merits review. An appeal to the court is limited to jurisdictional errors. The court is limited to looking at whether the Tribunal applied the law correctly with the information that was before it.

section 48B of the 1958 Migration Act. On 13 February 2009 and 3 March 2009, the author's request for intervention pursuant to sections 417 and 48B respectively of the 1958 Migration Act was rejected. The reasoning of the decision referred to the assessment by the Refugee Review Tribunal and the Federal Courts regarding the author's claims of religious persecution, mental health issues and concerns about procedural fairness.

2.7 On 20 April 2010, the author submitted a second request for a humanitarian intervention to the Minister for Immigration, Multicultural and Indigenous Affairs, pursuant to sections 417 and 48B of the 1958 Migration Act. This request was based on new information, namely an arrest warrant dated 31 July 2007, and two summonses dated 23 September 2004 and 18 June 2007.² The author has not previously been aware of these documents, as they were in the possession of his grandmother, who chose not to inform him thereof. After her death in 2009, his mother found them and sent them to the author. All of these documents were issued in relation to the author's suspected practice, learning and spreading of Falun Gong. The author argued that the fact that the Government of China has issued an arrest warrant demonstrates that he is a person of interest to the Chinese authorities. The request for humanitarian intervention also outlined the humanitarian concerns if the author were returned to China, in the light of the outstanding arrest warrant and his fragile state of mental health. It was submitted that the author was at risk of serious human rights violations if returned. On 11 May 2010, the Minister refused to intervene in the author's case concluding that the summonses were not credible and that it was not possible that such documents had been received by the author's relatives without them informing him of their existence.

The complaint

3. The author claims that he will be detained and tortured if returned to China, in violation of article 6, paragraph 1; article 7; article 9, paragraph 1; and article 17 alone and read in conjunction with article 2, paragraph 1, of the Covenant. He further claims that the existence of the summonses and, in particular, the arrest warrant demonstrates that he is a person of interest to the Chinese authorities and risks persecution on the basis of his practice of Falun Gong. The author cites numerous country reports, in which the persecution of Falun Gong members is highlighted, including by imprisonment in psychiatric institutions, labour camps or ordinary prisons accompanied by torture and ill-treatment during the deprivation of liberty. The author further argues that his profile could come to the adverse attention of the authorities through the combination of his mental illness and his religious beliefs, because mental illness carries a social stigma in China. Falun Gong practitioners are often confined to mental institutions in China and the author's risk of serious harm is compounded by the combination of mental illness and being a Falun Gong practitioner.

The State party's observations on admissibility

4.1 On 16 September 2010, the State party challenged the admissibility of the communication. The State party submits that the author's allegation under article 6 lacks clarity and is insufficiently substantiated, as the author merely claims that he fears to come to harm at the hands of the authorities if he is returned to China, without however adducing any evidence to substantiate this allegation. It notes that there was no suggestion that the author has experienced any threats to his life by the Chinese authorities and the documentation he provided as to the source of any threat to his life as a result of his

² As transpires from the copy of the summons issued by Fuqing Bureau of Public Security, the author was suspected of practising, learning and spreading Falun Gong "illegal organisation".

practice of Falun Gong is minimal. The State party refers to the decision by the Refugee Review Tribunal, which was not satisfied that the author was ever a Falun Gong practitioner and concluded that he had not been arrested, detained or tortured because of this practice. It had also concluded that the author was never made to sign a statement promising to not practice Falun Gong in the future and that he was never refused a Chinese passport due to his religious beliefs. The State party submits that the author's claim under article 6 should be rejected for failure to sufficiently substantiate it for purposes of admissibility under article 2 of the Optional Protocol.

4.2 With regard to the author's claim under article 7, the State party submits that for purposes of admissibility the author failed to substantiate his allegations under article 7. He did not adduce sufficient evidence to suggest that he would be tortured upon his return to China. The summonses and arrest warrant submitted by the author have been considered by the Department of Immigration and Citizenship, which concluded that they were not credible; in particular as at a time when the author was of particular interest to the authorities, he received a travel document and left China in December 2005. It notes that even if the summonses and the arrest warrant were authentic, they would be insufficient in themselves to evidence a real risk of irreparable harm to the author if he was returned to China.

4.3 The State party submits that its obligations of non-refoulement do not extend to potential breaches of article 9,³ in particular considering the author's failure to sufficiently substantiate his claims under articles 6 and 7. The State party submits that this part of the communication should also be declared inadmissible under article 2 of the Optional Protocol.

4.4 With regard to the author's claims under article 17, the State party submits that his allegations are unclear, as he did not make any reference to any risk for his family if he was returned to China. The State party also submits that the non-refoulement obligations do not extend to potential breaches of article 17 and that as such the author's claims should be declared inadmissible. Furthermore, the author also failed to substantiate his claims, as required under article 2 of the Optional Protocol.

The State party's observations on the merits

5.1 On 3 November 2011, the State party submitted its observations on the merits. It reiterates its submission on admissibility and submits that, in the event that the Committee finds the communication admissible, the author's allegations should be considered lacking merit.

5.2 With regard to the author's allegations pursuant to articles 6, paragraph 1, and 7 of the Covenant, the State party notes that the exact nature of his allegations are unclear and submits that, in accordance with article 2 of the Covenant, non-refoulement obligations only arise where the relevant risk is satisfied. The State party recalls the Committee's jurisprudence, according to which it does not question the evaluation of the evidence made in domestic processes and notes that the Refugee Review Tribunal, the Federal Magistrates' Court and the Federal Court did not identify any error in the proceedings. It reiterates that the author failed to provide sufficient evidence to substantiate his claims under articles 6 and 7 and that they should be declared inadmissible. If the Committee however finds them admissible, the State party submits that the author's communication does not contain any new material that has not already been considered by the State party's authorities. It argues

³ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

that the two summonses and the arrest warrant have been assessed by the Department of Immigration and Citizenship, which concluded that there were concerns with regard to the credibility owing to the high level of fraud encountered by the Department in such documents from the Fujian province. It also took into account information received by the Immigration and Refugee Board of Canada which indicated that the Public Security Bureau rarely uses arrest warrants. The State party further maintains that the author has given contradictory accounts as to his place of residence when explaining the late submission of the summonses and the arrest warrant, which casts additional doubts on their credibility. It finally notes that the author has not provided any evidence that he has been the subject of attention by the Chinese authorities whilst in Australia due to his Falun Gong activities, which were assessed to be private and limited. The State party therefore submits that the author failed to provide credible evidence to establish that there is a real risk that he would be subject to arbitrary deprivation of his life and/or torture or cruel, inhuman or degrading treatment or punishment if returned to China.

5.3 With regard to article 9, the State party reiterates its submission that non-refoulement obligations only apply where there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant and therefore submits that the author's claims under article 9 are inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol. It also reiterates that the author failed to sufficiently substantiate his claims. On the merits, the State party submits that he has not provided credible evidence to establish a real risk that he would be subject to treatment that is prohibited under article 9 of the Covenant and should therefore be dismissed as without merit.

5.4 As to the author's claims under article 17, the State party notes that the author does not make any reference to any risk to his privacy, family or correspondence. It argues that its non-refoulement obligations do not extend to potential breaches of article 17 and therefore the claim should be found inadmissible *ratione materiae* pursuant to article 3, of the Optional Protocol. It further reiterates that the author failed to sufficiently substantiate his claims under article 17. On the merits, the State party submits that the author failed to articulate any argument, nor provided any evidence to show that there could be any arbitrary interference with his privacy, family or correspondence.

Author's comments on the State party's observations on admissibility and merits

6.1 On 15 June 2012, the author submitted his comments on the State party's observations on admissibility and merits. In addition to the facts as presented in the initial submission, the author notes that the originals of the two summonses and the arrest warrant were served to the Department of Immigration and Citizenship on 17 October 2011.

6.2 On admissibility, the author submits that he sufficiently substantiated his claims relying on his past experience of ill-treatment at the hands of the Chinese authorities, the official and original arrest warrant and summonses and objective country evidence.

6.3 The author provides more details to his claims and submits that, whilst in detention, he fears being killed by the Chinese authorities as a result of extreme torture and ill treatment. The torture or cruel, inhuman or degrading treatment or punishment he would face if returned to China is arrest, detention, forced labour, enforced re-education through the "Re-education through Labour" regime, organ harvesting without consent, physical harm as well as physical and mental torture. Regarding his claim under article 9, he states that there is a substantial and present risk that he will be arbitrarily arrested and detained by the Chinese authorities owing to his practice of Falun Gong, and he specifically fears being indefinitely detained without trial or being formally charged. Regarding his claim under article 17, the author submits that he fears that the authorities will arbitrarily raid and search his house and that his family's safety will be jeopardized due to the Chinese authorities' interest in him as a Falun Gong practitioner.

6.4 On the merits, the author submits that the real risk of a violation of his rights under the Covenant relies on his past ill-treatment by the Chinese authorities and the existence of an arrest warrant and summonses that were not considered at each stage of the refugee determination process. While acknowledging that the independent information about a pattern of conduct in similar cases is not in itself conclusive for a violation, he recalls that according to the Committee's jurisprudence regard should be given to the wealth of reputable country information in relation to the treatment of suspected Falun Gong practitioners in China.

6.5 While it is difficult to obtain information with regard to the ill-treatment of Falun Gong practitioners owing to the stringent policies of the Chinese authorities in relation to accessibility of sensitive information, the author notes that the practice of Falun Gong was declared illegal in 1999 and since then the authorities have established the 6-10 office within the Office of the Leadership Team of the CCP Central Committee for Handling the Falun Gong Issue under the Ministry of Justice, which may operate extra legally and with impunity.⁴ Under the law, police and security officials are permitted to detain persons without formally arresting or charging them.⁵

6.6 With regard to his claim under article 6, the author submits that in order for his rights under article 6 to be violated, it is not necessary to prove that he will face the death penalty. While acknowledging that convicted Falun Gong practitioners do not usually face capital punishment, the author still faces a real risk that he will be killed as a result of practising his beliefs, as he could be detained and sustain severe injuries which could result in death.⁶ He notes that, while not having experienced any direct threat to his life by the Chinese authorities, the risk stems from the plausible outcome of death as a result of severe torture and physical harm which he already experienced in the past and which is detailed in reputable country reports. Moreover, while not facing the death penalty, he faces criminal charges which would certainly result in his arrest and detention where death is a result that is neither unrealistic nor remote.

6.7 In relation to article 7, the author recalls the concluding observations by the Committee against Torture, in which it expressed its concern at allegations of targeted torture, ill-treatment, and disappearances directed against, inter alia, Falun Gong practitioners,⁷ the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment⁸ and the Refugee Review Tribunal's Falun Gong (Falun Dafa) Resource Guide⁹ and notes that these findings are consistent with the author's previous experience and his allegation of what he would face if he were returned to China.

⁴ The author cites Yiyang Xia, "The illegality of China's Falun Gong crackdown – an today's rule of law repercussions", speech from Senior Director of Policy and Research at the Human Rights Law Foundation and Director of the Investigation Division of the World Organization to Investigate the Persecution of Falun Gong. Available from www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/506_yiyangxia_/506_yiyangxia_en.pdf.

⁵ The author refers to United States of America, Department of State, *2008 Human Rights Report – China* (2009).

⁶ The author refers to the addendum to the report to the Human Rights Council of the Special Rapporteur on extrajudicial, summary or arbitrary executions, communications to and from Governments, A/HRC/14/24/Add.1.

⁷ See concluding observations of the Committee against Torture on the report of China, CAT/C/CHN/CO/4.

⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to China, E/CN.4/2006/6/Add.6.

⁹ Australia, Refugee Review Tribunal (2008). Available from www.unhcr.org/refworld/docid/4b6fe1d35.html.

He further cites the United States Department of State *2010 Human Rights Report: China*,¹⁰ the report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,¹¹ the United States Commission on International Religious Freedom¹² and a report on organ harvesting from Falun Gong practitioners¹³ regarding the confinement of Falun Gong practitioners to psychiatric institutions and organ harvesting from Falun Gong practitioners and submits that he would face a real risk of torture or ill-treatment if he were to be returned to China.

6.8 While acknowledging that the State party's obligations of non-refoulement do not extend to potential breaches of article 9, the author submits that where there is real risk of irreparable harm, the State party is obliged not to return the author. He argues that the real risk of irreparable harm would occur as a result of arbitrary arrest or detention. The author notes that the 6–10 office operates extra legally and the systematic treatment and enforced detention of Falun Gong practitioners is a violation of article 9. He also cites reports by the United States Commission on Religious Freedom¹⁴ and the United Kingdom Home Office,¹⁵ which note that the system of re-education through labour operates outside of the judicial system and criminal procedure law and that it is an administrative measure which enables Chinese law enforcement officials to detain citizens up to four years. At least half of the official recorded inmates in re-education through labour camps are Falun Gong adherents.

6.9 With regard to article 17, the author acknowledges that non-refoulement obligations do not extend to violations of article 17; however, he maintains that, upon return to China, there is a real risk that authorities will interfere with his family and/or home and that there exists little if any protection from such treatment.¹⁶

State party's further observations

7. On 3 December 2012, the State party submitted further observations and notes that it has completed its assessment of the original copies of the two summonses of 23 September 2004 and 18 June 2007 and the arrest warrant of 31 July 2007 and found them inconclusive. It reiterates that the author's claims are not sufficiently substantiated, his claims under articles 9 and 17 are inadmissible *ratione materiae* and if his claims are found to be admissible they are without merit.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

¹⁰ United States, Department of State (2011).

¹¹ E/CN.4/2006/6/Add.6.

¹² United States, United States Commission on International Religious Freedom, "People's Republic of China" in *Annual Report 2010*.

¹³ David Matas and David Kilgour, *Bloody Harvest: Revised Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China* (2007).

¹⁴ United States Commission on International Religious Freedom, "People's Republic of China" in *Annual Report 2012* (2012).

¹⁵ United Kingdom of Great Britain and Northern Ireland, Home Office, *Country of Origin Information Report – China* (2009).

¹⁶ United States, *2008 Human Rights Report – China*.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's challenge to the admissibility of the communication pursuant to article 2 of the Optional Protocol on the ground of the author's failure to substantiate his claims under articles 6, paragraph 1; 7; 9, paragraph 1; and 17 of the Covenant. The Committee notes the author's contentions that he sufficiently substantiated his claims relying on his past experience of ill-treatment by the Chinese authorities, the official arrest warrant and the two summonses, as well as country information confirming his allegations regarding the treatment of Falun Gong practitioners.

8.4 With regard to the author's claim under article 6, paragraph 1, the Committee notes that the information submitted to it does not provide sufficient grounds to substantiate that the author's removal to China would expose him to a real risk of a violation of his right to life. The author's contentions in this respect are general allegations mentioning the risk of arbitrary arrest and detention, which could ultimately lead to his death due to torture, while however acknowledging that he has not experienced any direct threat to his life. In these circumstances, the Committee considers that the author has not sufficiently substantiated his claims under article 6, paragraph 1, of the Covenant and therefore declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

8.5 With regard to the author's claims under article 17, the Committee notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of article 17. The Committee notes the author's argument that there is a real risk that the authorities in China would interfere with his family and/or home and that there exists no protection from such treatment. The Committee observes that author's allegations remain general in this regard and that he has not adduced any evidence of a potential violation. Accordingly, the Committee concludes that this part of the communication is inadmissible for failure to sufficiently substantiate his claim pursuant to article 2 of the Optional Protocol.

8.6 As for the author's claims under article 7 of the Covenant, the Committee notes that he has explained that the reasons why he feared being returned to China were based on the detention and treatment that he allegedly suffered due to his religious beliefs, on the arrest warrant and two summonses in relation to his membership of Falun Gong and on country information which contains information of torture, ill-treatment, organ harvesting and confinement to psychiatric institutions of Falun Gong practitioners. The Committee finds that, for the purposes of admissibility, the author has provided sufficient details and documentary evidence on his personal risk of torture, cruel, inhuman or degrading treatment or punishment as an alleged Falun Gong practitioner if he was returned to China and therefore finds the author's claims under article 7 admissible.

8.7 With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that its non-refoulement obligations do not extend to a potential breach of this provision, in particular considering the author's failure to sufficiently substantiate his claims under articles 6 and 7. The Committee takes note of the author's allegations that, as a Falun Gong practitioner, he fears being detained indefinitely without trial or charges, which brings with it the risk of torture or cruel, inhuman or degrading treatment or punishment while in detention. The Committee observes that the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of

article 7 of the Covenant¹⁷ and concludes that for the purposes of admissibility the author has sufficiently substantiated his claims under article 9, paragraph 1.

8.8 The Committee declares the communication admissible in so far as it appears to raise issues under articles 7 and 9, paragraph 1, alone and read in conjunction with article 2, paragraph 1, of the Covenant, and proceeds to its consideration on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that, as a Falun Gong practitioner, he would face arrest, detention, forced labour, enforced re-education through the regime of re-education through labour, organ harvesting without consent, physical harm and physical and mental torture. It notes the author's argument that the real risk of a violation of his rights relies on his past ill-treatment, which included beating, burning with cigarettes, suspension in handcuffs with beating, denial of access to medical care and psychological torture, the existence of an arrest warrant and summonses which were not considered at each stage of the refugee determination proceedings, as well as independent country information on a pattern of conduct in similar cases. It also notes the State party's observations that the Refugee Review Tribunal was not satisfied that the author was ever a Falun Gong practitioner, that he had not been detained or tortured because of his practice, that he was never made to sign a statement renouncing his practise of Falun Gong and that he was never refused a passport owing to his beliefs. It also notes the State party's argument that the domestic authorities found that the two summonses and the arrest warrant were not credible due to the high level of fraud of such documents and the fact that the Public Security Bureau rarely issues arrest warrants, as well as the explanations on the author's late submission of these documents.

9.3 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm.¹⁸ The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.¹⁹

9.4 While noting that there are reports of serious human rights violations in China for those identified as Falun Gong practitioners, in particular those who hold a prominent position in the movement, the Committee observes that the author's refugee claims were thoroughly examined by the State party's authorities, which concluded that if the author has at all been involved in the Falun Gong movement while still in China, he did not indicate any involvement beyond being an ordinary member and despite the alleged summons of 23 September 2004, the author was able to leave the country without any hindrance. It also notes the State party's authorities' assessment of the evidence which revealed several contradictions with regard to the time of commencement of the author's practice of Falun

¹⁷ See communication No. 1912/2009, *Thuraisamy v. Canada*, Views adopted on 31 October 2012, para. 6.6.

¹⁸ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

¹⁹ See communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; see also communication No. 1819/2008, *A.A. v. Canada*, decision of inadmissibility adopted on 31 October 2011, para. 7.8.

Gong, his employment record, his place of residence and the way he obtained the two summonses and the arrest warrant. The Committee also finds it inconsistent that the author, after allegedly having been detained on 20 November 1999 and ill-treated during his two months' detention, has not faced any problems and decided only six years later to leave China and seek refugee protection in Australia. With regard to his practice of Falun Gong in Australia, the Committee notes that the State party has accepted that the author was practising Falun Gong and had basic notions of the movement; however, it concluded that the author's practice was of private and limited scope and has not raised any suspicion of the Chinese authorities. The Committee notes that the author has not challenged this assessment. With regard to the author's medical condition, the Committee notes that his state of mental health led to a postponement of the hearing before the Refugee Review Tribunal; however, it did not impede his testimony at a later stage. The Committee nevertheless considers that the author's medical condition in itself is not of such exceptional nature to trigger the State party's non-refoulement obligations under article 7. In the light of the above, the Committee cannot conclude that the information before it shows that the author would face a real risk of treatment contrary to article 7 of the Covenant if removed to China.

9.5 With regard to the author's claim under article 9, paragraph 1, the Committee refers to its conclusions under article 7 and for the same reasons finds that the author would not face a real risk of a violation under article 9, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to China would not violate his rights under article 7 and 9, paragraph 1 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

II. Communication No. 2073/2011, *Naidenova et al. v. Bulgaria* (Views adopted on 30 October 2012, 106th session)*

<i>Submitted by:</i>	Liliana Assenova Naidenova et al. (represented by counsel, the Global Initiative for Economic, Social and Cultural Rights and the Equal Opportunities Association)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Bulgaria
<i>Date of communication:</i>	25 June 2011 (initial submission)
<i>Subject matter:</i>	Impending eviction and demolition of housing of the long-standing Roma community
<i>Procedural issues:</i>	Another procedure of international investigation or settlement; exhaustion of domestic remedies
<i>Substantive issues:</i>	Effective remedy; unlawful and arbitrary interference with one's home; right to equality before the law/equal protection of the law; discrimination on the ground of ethnic origin
<i>Articles of the Covenant:</i>	2; 17 and 26
<i>Article of the Optional Protocol:</i>	5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2012,

Having concluded its consideration of communication No. 2073/2011, submitted to the Human Rights Committee by Liliana Assenova Naidenova and 9 other individuals under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, dated 25 June 2011, are Liliana Assenova Naidenova, Blaga Lubchova Naidenova, Traianka Ivanova Naidenova, Gura Borisova

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Marinova, Pavel Triachev Peshev, Blagoi Trianov Assenov, Pavlina Marinova Mladenova, Stefka Vassileva Christova, Stoianka Tzvetanova Trianova and Vela Borisova Mihailova, all Bulgarian nationals of Roma ethnicity belonging to the Dobri Jeliaskov community, situated in Sofia, Bulgaria. They claim a violation by Bulgaria of their rights under articles 2, 17 and 26 of the International Covenant on Civil and Political Rights in case of eviction and demolition of housing in the Dobri Jeliaskov community. The Optional Protocol entered into force for Bulgaria on 26 June 1992. The authors are represented by counsel, the Global Initiative for Economic, Social and Cultural Rights and the Equal Opportunities Association.

1.2 On 8 July 2011, in accordance with rule 92 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to evict Liliana Assenova Naidenova and the other authors, and not to demolish their dwellings while their communication was under consideration by the Committee. This request for interim measures of protection was reiterated on 9 May 2012.

Factual background

2.1 The Dobri Jeliaskov community consists of impoverished Roma and has been in existence for over seventy years. During this time, the housing of the community has been de facto recognized by public authorities, including through being provided with individual mail service and publicly regulated services, such as electricity. The community also has police registration of their address.

2.2 On 12 July 2006, inhabitants of the Dobri Jeliaskov community were notified about the so-called “invitation letter” issued on 11 July 2006 by the mayor of the Sofia Metropolitan Municipality, Vuzrajane subdistrict, requesting them to voluntarily leave the houses constructed unlawfully on municipal land. The community did not comply with this request and, on 24 July 2006, the Metropolitan Municipality, Vuzrajane subdistrict, issued an eviction order against the Dobri Jeliaskov community. The eviction order states that unlawful buildings have been constructed on undisputable municipal land, as established by the district municipal administration with protocols dated 26 June 2006 and cites article 65 of the Municipal Property Act and article 178, paragraph 5, of the Territory Law, which allow for eviction of individuals and demolition of buildings constructed without the proper permits on municipal property. Representing the community, the Equal Opportunities Association appealed the order before the Sofia City Court and asked for an injunction against the eviction pending the examination of their appeal, which is permitted under article 65 of the Municipal Property Act. That injunction was initially granted by the Sofia City Court.

2.3 On 15 April 2008, however, the Sofia City Court ruled that the eviction order was lawful. The Dobri Jeliaskov community appealed the Sofia City Court’s decision before the Supreme Administrative Court, which upheld it on 28 October 2009. Since then the order has been subject to imminent execution. On 26 March 2011 the Sofia Municipality issued a protocol for execution of the eviction order. This protocol was handed to the inhabitants of the Dobri Jeliaskov community on 23 June 2011, and they were given seven days to submit their objections. Although the objections have been filed with the municipality, they would not have halted the evictions.

2.4 At the time when this communication was submitted to the Committee, ten households were under imminent threat of forced eviction and demolition. Back then, 34 individuals lived in the Dobri Jeliaskov community, 15 of whom were children. The remainder of the community had left the area after the initial eviction order was issued in 2006. According to the authors, none of those to be forcibly evicted have been offered alternative housing; no meaningful consultation has taken place with the community; and

the mayor of the Sofia Municipality, Vuzrajane subdistrict, has stated that the municipality could not provide alternative housing for the families, since they lived in the Dobri Jeliaskov community illegally.

The complaint

3.1 The authors submit that it is largely due to the persistent pattern of racial discrimination against Roma that the Dobri Jeliaskov community is an informal settlement (e.g., “unlawful buildings”). This discrimination includes lack of education and employment opportunities necessary to afford housing at market rates. They refer to the concluding observations of the Committee on Economic, Social and Cultural Rights, stating that “success has not been achieved” in the State party’s efforts to combat unemployment and “deplor[ing] the situation where those who are employed receive salaries which do not allow them to secure for themselves and their families an adequate standard of living”.¹

3.2 The authors state that the State party has denied the long-standing Dobri Jeliaskov community any security of tenure, including the minimum “degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats” required by its international and domestic human rights obligations.² They add that there are no mechanisms at the domestic level to challenge successfully eviction in such cases where there exists a denial of even the minimum degree of security of tenure.³

3.3 The authors submit that the forced evictions and threatened forced evictions amount to a violation of article 17, read in conjunction with article 2, of the Covenant. They recall that the Committee has previously stated in concluding observations that the practice of forced evictions “arbitrarily interferes with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant”.⁴ The Committee went on to state that the State party concerned should “ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made”.⁵ In a similar factual situation, the Committee condemned forced eviction and demolition of homes built without permits as well as discriminatory municipal planning systems.⁶

3.4 The authors claim that the threatened forced eviction of the Dobri Jeliaskov community is also unlawful in that it contravenes, inter alia, the right to adequate housing, including the prohibition on forced eviction, enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights as informed by general comments No. 4 (1991) and 7 (1997) on the right to adequate housing: forced eviction⁷ of the Committee on Economic, Social and Cultural Rights, and that those general comments provide persuasive authority for defining the prohibition on forced evictions under international law generally and including under the Covenant. Therefore, since forced evictions as such are contrary to

¹ Committee on Economic, Social and Cultural Rights, concluding observations on the third periodic report of Bulgaria, E/C.12/1/Add.37, paras. 13 and 14.

² Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing, *Official Records of the Economic and Social Council, 1992, Supplement No. 2* (E/1992/23), annex III, para. 8 (a).

³ Notwithstanding, the authors have attempted to challenge the eviction orders by bringing a case before the Sofia City Court.

⁴ Human Rights Committee, concluding observations on the second periodic report of Kenya, CCPR/CO/83/KEN, para. 22.

⁵ Ibid.

⁶ Human Rights Committee, concluding observations on the third periodic report of Israel, CCPR/C/ISR/CO/3, para. 17.

⁷ *Official Records of the Economic and Social Council, 1998, Supplement No. 2* (E/1998/23), annex IV.

the Covenant on Economic, Social and Cultural Rights, they amount to *unlawful*⁸ interference with the home and are thus also in violation of article 17 of the Covenant.

3.5 The authors argue that the forced evictions are also *arbitrary*⁹ in that they are undertaken in a racially discriminatory manner. The threatened forced eviction of the Dobri Jeliaskov community is largely due to the inhabitants' Roma ethnicity and the informal housing conditions in which Roma have to live because of their ethnic origin. The authors add that as such the evictions have both an unlawful discriminatory intent and an unlawful discriminatory effect.

3.6 The authors refer to Council of Europe Recommendation (2005) 4 on improving the housing conditions of Roma and Travellers in Europe, adopted on 23 February 2005,¹⁰ and submit that the Recommendation should be used as persuasive authority in interpreting article 17 of the Covenant and, since it is binding on Bulgaria, any contravention of Council of Europe Recommendation (2005) 4 would amount to an unlawful interference with the home. Based on the foregoing, the authors claim that the threatened forced eviction at stake in this communication should be deemed unlawful as well as arbitrary and consequently in violation of article 17 of the Covenant.

3.7 The authors claim that the threatened forced evictions amount to a violation of article 26, read in conjunction with article 2 of the Covenant. By virtue of article 5(4) of the Constitution, the rights enshrined in the Covenant and other treaties ratified by Bulgaria are directly binding within its domestic legal framework. Article 26 requires that the rights guaranteed by article 17 of the Covenant be guaranteed without discrimination on account of Roma ethnic origin, as well as guaranteeing the equal protection of article 17 of the Covenant.

3.8 The authors submit that the State party has ratified the Covenant on Economic, Social and Cultural Rights and that, therefore, the rights guaranteed thereunder are directly binding within its domestic legal framework, including the right to adequate housing, and including the prohibition on forced eviction, enshrined in article 11 thereof. The authors submit that article 11 of the Covenant on Economic, Social and Cultural Rights, read in conjunction with article 2, obliges the State party to respect, protect and fulfil the right to adequate housing without discrimination. They add that the right to adequate housing enshrined in article 11 of the Covenant on Economic, Social and Cultural Rights, which is similar to the rights protected by article 17 of the Covenant, prohibits forced eviction. Under the Covenant on Economic, Social and Cultural Rights, evictions can only be justified in highly exceptional circumstances and after all feasible alternatives to eviction have been explored in meaningful consultation with the persons affected. Even then, various due process protections as outlined in general comment No. 7 of the Committee on Economic, Social and Cultural Rights must be adhered to (para. 16). Finally, and even if the due process criteria have been satisfactorily met, evictions cannot be carried out in a

⁸ Emphasis added by the authors.

⁹ Emphasis added by the authors.

¹⁰ Recommendation (2005) 4, *inter alia*, requires that national housing policies address the specific problems of Roma housing as a matter of emergency and in a non-discriminatory manner. The Recommendation also states that "Member states should promote and protect the right to adequate housing for all, as well as ensure equal access to adequate housing for Roma through appropriate, proactive policies, particularly in the area of affordable housing and service delivery". With respect to "protection and improvement of existing housing", States "should ensure that Roma are protected against unlawful eviction, harassment and other threats regardless of where they are residing" and "should establish a legal framework that conforms with international human rights standards, to ensure effective protection against unlawful forced and collective evictions and to control strictly the circumstances in which legal evictions may be carried out".

discriminatory manner, nor can they result in rendering individuals homeless or vulnerable to the violation of other human rights.

3.9 The authors claim that, as demonstrated by the facts and domestic procedures in the present communication, the State party has failed to abide by the legal process related to the prohibition on forced eviction. They conclude that the State party is in violation of article 26 of the Covenant for not prohibiting discrimination on account of Roma ethnic origin, not providing for the equal protection of article 17 of the Covenant or for the equal protection of the rights enshrined in the Covenant on Economic, Social and Cultural Rights, including the right to adequate housing and the prohibition on forced eviction.

3.10 The authors submit in conclusion that, if the forced eviction of the Dobri Jeliaskov community is implemented, the State party would violate articles 17 and 26 of the Covenant, read alone and in conjunction with article 2, including the non-discrimination clause of article 2, paragraph 2, of the Covenant. They further submit that an immediate injunction against any forced eviction of the Dobri Jeliaskov community should be granted as a matter of urgency. The authors add that remedies should also include the regularization of the Dobri Jeliaskov community, including the provision of a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. All remedies should be implemented with the genuine and meaningful participation of the Dobri Jeliaskov community.

State party's observations on admissibility and merits

4.1 By note verbale of 9 September 2011, the State party submitted its observations on admissibility and merits of the communication. As to the admissibility, it states that the authors have failed to exhaust all available domestic remedies and that, therefore, the communication should be declared inadmissible pursuant to rule 96 (f) of the Committee's rules of procedure. The State party submits that, in its decision of 28 October 2009, the Supreme Administrative Court has found that the authors have failed to produce any evidence establishing their right of ownership of the immovable property, parts of it or the right to erect constructions on the said immovable property. According to article 587 of the Code of Civil Procedure, the initiative to prove one's property rights is vested with the authors. They are given the opportunity to prove ownership over certain immovable property by presenting a proof of continuous ownership of the immovable property in question to a notary public.

4.2 The State party submits that the authorities have not been able to find any proof whether the procedure envisaged under article 587 of the Code of Civil Procedure has even been initiated by the authors or by their respective representatives. The authors have initiated an appeal procedure against the eviction order, which is based on the ownership documents presented by the municipality. The State party adds that the authorities are also unaware of whether the authors have seized any national human rights body, such as the Ombudsman and the Commission on Protection against Discrimination, of the matter.

4.3 The State party draws the Committee's attention to the fact that the authors of the present communication have submitted similar claims to the complaint procedure of the Human Rights Council, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Independent Expert on minority issues and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. It submits that such controversial practices do not conform to rule 96 (c) of the Committee's rules of procedure and, consequently, should not be encouraged.

4.4 As to the merits, the State party submits that the immovable property in question has been expropriated by the municipality in 1974 in accordance with the plans for territorial

development of Sofia applicable at that time. Compensation has been provided in the form of property rights over apartments in the newly constructed buildings.

4.5 The State party states that the appeal procedure against the eviction order of 24 July 2006 has been concluded and the Supreme Administrative Court has confirmed the illegality of the authors' actions on 28 October 2009. The municipal property is, however, still in their possession and no eviction has been carried out by the municipal authorities.

4.6 The State party submits that the principle of equality of all citizens before the law is set forth in article 6(2) of the Constitution and the basic law does not allow for any limitation of rights nor for any privileges whatsoever on the basis of race, nationality, ethnic identity, sex, origin, religion, education, convictions, political affiliations, personal or social status. In its Interpretative Judgment No. 14 of 1992, the Constitutional Court ruled that "equality of all citizens before the law" within the meaning given by article 6(2) of the Constitution signifies equality before all legal acts. The Protection against Discrimination Act adopted in 2003 also confers equal rights on all citizens, regardless of their ethnic identity, in respect of the possibility to have access to rental accommodation in social housing or construction or, respectively, to purchase a property. The State party adds that victims of the alleged discrimination have the choice whether to submit a complaint before the Commission for Protection against Discrimination or before the court. Pursuant to article 53 of the Protection against Discrimination Act, the procedure before the Commission is free of charge.

4.7 The State party states that the authorities' policy regarding the Roma community is based on the Framework Programme for Equal Integration of Roma in the Bulgarian society (Framework Programme), adopted by Council of Ministers Decision in 1999. Section IV "Territorial Structure of the Roma Neighbourhoods" of the Framework Programme stipulates that the separated Roma neighbourhoods, most of which are situated outside the respective city plans and do not have an adequate infrastructure, are one of the most serious socioeconomic problems of the community. This Framework Programme was updated in 2010 and its scope was expanded to include the issues of discrimination. The State party also refers in this context to the National Programme for the Improvement of the Housing Conditions of Roma in Bulgaria (2005–2015).

4.8 The State party also notes that a number of projects aimed at improving the situation of members of the ethnic groups, with a special focus on Roma, have been implemented and are being implemented in the context of the compliance with the criteria for membership of the European Union. These projects are financed under the Programme of Community aid to the countries of Central and Eastern Europe (Phare) of the European Union, by the Council of Europe Development Bank, under the national budget through the budget of the Ministry of Regional Development and Public Works and through the budgets of a number of municipalities. The State party adds that Roma integration activities, including projects implemented by non-governmental organizations and financed from national or external sources, are subject to constant monitoring.

4.9 The State party submits that the Commission on Roma Integration has been established within the National Council for Cooperation on Ethnic and Demographic Issues (Council for Cooperation), which is an advisory and coordinating body under the Council of Ministers. Furthermore, there exists the Public Council on Roma Issues and one of the most important points on its agenda is the resolution of the housing problems of the Roma community in Sofia. A project plan has been developed and submitted for approval by the Municipal Council within the framework of the Operative Programme "Regional Development (2007–2013)". According to the project, the Sofia Municipality would purchase plots for the construction of buildings with developed social and technical infrastructure. The new buildings are aimed at providing modern social housing to socially disadvantaged persons, including Roma, in Sofia.

Authors' comments on the State party's observations

5.1 On 24 October 2011, the authors commented on the State party's observations. They argue that the present communication should be declared admissible, since the international procedures invoked by the State party, namely the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Independent Expert on minority issues do not fall within the scope of the "procedure of international investigation or settlement" referred to in article 5, paragraph 2 (a), of the Optional Protocol or in rule 96 (e) of the Committee's rules of procedure.¹¹

5.2 As to the State party's reference to the complaint procedure of the Human Rights Council, the authors submit that neither the Global Initiative for Economic, Social and Cultural Rights nor the Equal Opportunities Association has had recourse to this procedure in the present communication. In any event, the complaint procedure of the Human Rights Council also does not fall within the scope of the "procedures of international investigation or settlement" referred to in article 5, paragraph 2 (a), of the Optional Protocol or in rule 96 (e) of the Committee's rules of procedure.

5.3 As to the exhaustion of domestic remedies, the authors note that the State party acknowledges in its observations that "the appeal procedure [against the eviction order of 24 July 2006] has been concluded and the Supreme Administrative Court has confirmed the illegality of the authors' actions". They submit, therefore, that there are no further domestic remedies to exhaust. The authors argue that the State party's acknowledgement of the Supreme Administrative Court's decision also demonstrates that domestic law fails to provide a remedy for those facing forced eviction from so-called informal settlements.

5.4 As to the Ombudsman and the Commission on Protection against Discrimination, the authors submit that the former was used by them but was unable to halt the threat of forced eviction which was to be implemented in July 2011. In this regard, they recall that the eviction order has not been implemented to date due to the interim measures of protection requested by the Committee on 8 July 2011. The authors further submit that they could not have resorted to the Commission on the Protection against Discrimination, since the subject matter of the present communication has already been litigated before the State party's courts.¹² With reference to the Committee's jurisprudence,¹³ the authors argue that the requirement to exhaust all available domestic remedies applies insofar as such remedies appear to be effective in the particular communication. Therefore, the authors submit that there is no domestic law or remedy available to them that could prevent the forced eviction.

¹¹ Reference is made to communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1; and Office of the United Nations High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (New York and Geneva, 2008), pp. 157–158.

¹² According to article 6, paragraph 2, point 2 of the rules of procedure of the Commission on the Protection against Discrimination, "[a] person who addresses an application before the Commission is required to attach a declaration that there is no other case between the same parties, initiated before the court".

¹³ See, for example, communications No. 1403/2005, *Gilberg v. Germany*, decision of inadmissibility adopted on 25 July 2006, para. 6.5; No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted 2 November 2004, para. 7.2. Reference is also made to James Crawford, "International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries" (Cambridge University Press, 2002), p. 265.

5.5 On the merits, the authors submit that the compensation project for the immovable property in question (see para. 4.4 above) was never fully implemented and none of them was compensated, contrary to what is suggested by the State party. Indeed, they still reside in the Dobri Jeliaskov community which has existed in that location for over seventy years. As to the laws, policies and programmes aimed at the improvement of the housing conditions for Roma that are referred to by the State party in its observations, the authors state that the Dobri Jeliaskov community has not benefited from any of those.

5.6 With reference to the jurisprudence of the European Committee of Social Rights,¹⁴ the authors add that, in the event that the Dobri Jeliaskov community is considered informal or “illegal”, that alone still does not justify forced eviction. The authors conclude that, if implemented, the forced eviction of the Dobri Jeliaskov community would be a violation by the State party of articles 17 and 26 of the Covenant, read alone and in conjunction with article 2, including the non-discrimination clause of article 2. They submit that the remedies should include the regularization of Dobri Jeliaskov community, including the provision of a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. If the Dobri Jeliaskov community prefers the provision of alternative housing, its inhabitants must be allowed to freely, actively and meaningfully participate in all decisions related to such provision of alternative housing.

State party’s further observations on admissibility and merits

6.1 By note verbale of 5 January 2012, the State party submitted its further observations. It argues that the authors’ claim on property rights over the plot of land where the structures of the so-called “Dobri Jeliaskov community” are situated remains unsubstantiated. In 1974, the plot of land in question was expropriated by the municipality for construction of two apartment buildings and compensation was provided. The State party adds that this fact was established beyond any doubt by the Supreme Administrative Court in its decision of 28 October 2009. Any additional property claims should be pursued through established domestic procedures, pursuant to article 587 of the Code of Civil Procedure.

6.2 With reference to article 12 of the Sofia Municipality Planning and Development Act,¹⁵ containing an exhaustive list of all construction that may be permitted in the so-called green zone, the State party submits that the legalization of the Dobry Jeliaskov community, which is situated in such a zone between two apartment buildings, will deprive the neighbouring communities of their allotted rights.

6.3 The State party adds that, during the latest inquiry held by the Public Council on Roma Issues in July 2011, the inhabitants of the Dobry Jeliaskov community confirmed once again their preference to be provided with alternative accommodation within the city limits. Such a solution is being sought within the framework of the Operative Programme “Regional development (2007–2013)” (see para. 4.9 above). Due to the determination of the municipal authorities to find a durable solution of the issue, while respecting the human rights of the inhabitants, no eviction has been carried out with regard to the Dobry Jeliaskov community.

¹⁴ Reference is made to the European Committee of Social Rights, *European Roma Rights Center v. Bulgaria*, complaint No. 31/2005, decision on the merits of 18 October 2006, para. 53 and conclusion; and *INTERIGHTS v. Greece*, complaint No. 49/2008, decision on the merits of 11 December 2009, para. 60 and conclusion.

¹⁵ Article 12 of Sofia Municipality Planning and Development Act reads as follows: “After public discussion construction shall be permitted in the development zones and independent terrains of the green system designated for: (1) networks and facilities of the technical infrastructure; (2) maintenance of the green system; (3) sport and entertainment activities and children playgrounds; and (4) servicing of the visitors.”

6.4 The State party notes that the decision of European Committee of Social Rights in the *European Roma Rights Centre v. Bulgaria* (see, paragraph 5.6 above) was subject to control by the Committee of Ministers of the Council of Europe, which has specifically acknowledged¹⁶ measures undertaken by the State party both at local and national level to improve the situation of Roma with regard to housing.

Authors' comments on the State party's further observations

7. On 11 March 2012, in response to the State party's further observations, the authors reaffirm that they have never received any compensation upon their housing and land being expropriated by the State party's authorities. They add that the green zone was established long after the Dobri Jeliaskov community was in existence. Furthermore, the right to development and the human rights-based approach to development require that the needs of the inhabitants of the Dobri Jeliaskov community be prioritized in any urban development scheme rather than having urban development schemes result in further impoverishment. The authors also submit that there has not been any meaningful dialogue with the Dobri Jeliaskov community concerning the provision of alternative accommodation and relocation. As to the State party's assertion that the threatened forced eviction of the Dobri Jeliaskov community has not been carried out "due to the determination of the municipal authorities to find a durable solution of the issue", the authors assert that it was rather due to the interim measures requested by the Committee.

State party's additional observations on the merits

8. On 25 April 2012, the State party submitted its additional observations, stating that the compensation for the nationalized plot of land in question was paid on 25 December 1975. It argues that the municipal authorities are engaged in a dialogue with the representatives of the Dobri Jeliaskov community, which may be seen from records of the Roma Municipal Council's workings in the Vuzrajane subdistrict. The State party adds that the district administration strictly complies with all relevant recommendations with regard to the present communication, including the Ombudsman's recommendation not to undertake any action on the removal of unlawful inhabitants until all necessary conditions for alternative housing have been met.

Additional submissions concerning interim measures

9. On 8 May 2012, the authors submit that, in an attempt to force them to leave, the Municipality of Sofia had the water company, Sofiyska Voda, cut off the water supply to the Dobri Jeliaskov community on 29 April 2012. They argue that by depriving them of access to running water, the State party violates the Committee's request for interim measures of protection. Furthermore, as a means of forcible eviction, the cutting off of water violates a prohibition on unlawful or arbitrary interference with the home, which is stipulated in article 17 of the Covenant. Additionally, the cutting off of water rises to a threat of violating the right to life enshrined in article 6 of the Covenant¹⁷ and the prohibition on cruel, inhuman or degrading treatment or punishment enshrined in article 7 of the Covenant. The authors ask the Committee to urgently intervene with the State party and to request it to abide by its obligations to ensure the rights guaranteed under the Covenant, including by directing the Municipality of Sofia and the water company,

¹⁶ Resolution CM/ResChS(2007)2 on Collective Complaint No. 31/2005 by the European Roma Rights Centre against Bulgaria.

¹⁷ Reference is made to the Human Rights Committee, concluding observations on the third periodic report of Israel, para. 18.

Sofiyska Voda, to immediately re-establish access to water for the Dobri Jeliaskov community.

10. On 9 May 2012, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, reiterated its request for interim measures of protection. The State party was informed that, while the authors have not been forcibly evicted, cutting off the water supply to the Dobri Jeliaskov community could be considered as indirect means of achieving eviction. The State party was consequently requested to re-establish water supply to the Dobri Jeliaskov community.

11. On 21 May 2012, the State party submitted its further observations and stated that during a regular examination of the water installations, the owner, stock company Sofiyska Voda, discovered the existence of two continuously running taps without stopcocks and water meters, which had been illegally added to the existing water network. These two water taps were consequently removed. It argues, therefore, that the actions in question are irrelevant to the present communication and were certainly not aimed at forcibly evicting the authors from their homes.

12.1 On 30 May 2012, the authors submit that the Equal Opportunities Association, representing the Dobri Jeliaskov community, met with the Sofiyska Voda water company on 19 May 2012 in order to negotiate re-establishment of access to water. The individual homes lack access to water infrastructure and the Dobri Jeliaskov community has shared this limited water source for over fifty years. The Equal Opportunities Association and Sofiyska Voda water company initially agreed that the Dobri Jeliaskov community requires access to water and began discussing details on how to re-establish connection including having the Equal Opportunities Association guarantee the payment. This meeting was later attended by the mayor of the Sofia Metropolitan Municipality, Vuzrajane subdistrict, as these local authorities claim to own the plot of land on which the Dobri Jeliaskov community has resided for over seventy years and therefore have to agree to any re-establishment of access to water. Upon the arrival of the mayor, it became apparent that the municipality was reluctant to allow access to water to be re-established.

12.2 The authors further submit that, eventually, the Equal Opportunities Association was asked to leave the room so that the mayor and her staff could meet privately with staff of the Sofiyska Voda water company. It is unknown what transpired at this meeting, but it was promised that the Equal Opportunities Association would be informed of any decision. Subsequent to this meeting, a deputy mayor met with the Dobri Jeliaskov community and informed them that the authorities refused to agree with re-establishment of water access for the community. At the time when the authors' further information of 30 May 2012 was submitted, water access had yet to be re-established.

12.3 In the same submission, the authors also draw the Committee's attention to a recent judgment of the European Court of Human Rights¹⁸ in which the European Court unanimously ruled that a threatened forced eviction of a long-standing Roma community, notwithstanding its informal tenure status, would violate article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the Bulgarian authorities must consider alternatives to eviction including regularizing tenure status and upgrading existing housing in consultation with the community. They add that article 8 of the European Convention guarantees respect for the home, which is similar to the rights protected under article 17 of the Covenant.

¹⁸ *European Court of Human Rights, Yordanova and Others v. Bulgaria* (application no. 25446/06), Judgment of the European Court of Human Rights, 24 April 2012.

Issues and proceedings before the Committee

Consideration of admissibility

13.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

13.2 With regard to the requirement laid down in article 5, paragraph 2 (a), of the Optional Protocol, the Committee takes note of the State party's argument that the authors of the present communication have submitted similar claims to the complaint procedure of the Human Rights Council, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Independent Expert on minority issues and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The Committee further notes the authors' explanation that neither the Global Initiative for Economic, Social and Cultural Rights nor the Equal Opportunities Association has had recourse to the complaint procedure of the Human Rights Council. The authors also argued that, in any event, none of the procedures invoked by the State party falls within the scope of the "procedure of international investigation or settlement" referred to in article 5, paragraph 2 (a), of the Optional Protocol.

13.3 In this regard, the Committee recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹⁹ The Committee recalls that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Protocol.²⁰ Accordingly, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (a) of the Optional Protocol, from examining the communication.

13.4 The Committee notes the State party's objection to the admissibility of the present communication due to the authors' failure to exhaust domestic remedies. It notes the State party's explanation, according to which they had an opportunity to prove their property rights on the plot of land where the Dobri Jeliaskov community is situated pursuant to article 587 of the Code of Civil Procedure and that the authors did not seize the Ombudsman and the Commission on Protection against Discrimination of the matter. The Committee also notes the authors' argument that, although they had made recourse to the Ombudsman, this institution was unable to halt the threat of eviction which was to be implemented in July 2011. The authors further argued that they could not have resorted to the Commission on the Protection against Discrimination, since the subject matter of the present communication had already been litigated before the State party's courts and that, in any event, there was no domestic law or remedy available to them that could have prevented the eviction of the Dobri Jeliaskov community. The Committee further notes that

¹⁹ See communications No. 540/1993, *Celis Laureano v. Peru*, para. 7.1; and No. 1776/2008, *Ali Bashasha and Hussein Bashasha v. Libyan Arab Jamahiriya*, Views adopted on 20 October 2010, para. 6.2.

²⁰ See communication No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 6.2.

the authors have unsuccessfully challenged before the Sofia City Court and the Supreme Administrative Court the eviction order of 24 July 2006.

13.5 While having noted article 587 of the Code of Civil Procedure, according to which an individual may prove ownership over certain immovable property by presenting a proof of continuous ownership of the immovable property in question to a notary public, the Committee nevertheless considers that the State party has not provided any detailed information on the availability and effectiveness of the remedy under its Code of Civil Procedure in the particular circumstances of the authors' case, that is, in the absence of a claim to legal title on their part. The Committee further observes that the eviction of the Dobri Jeliakov community was to be implemented in July 2011 and that there were no further domestic remedies available to the authors that could have prevented the eviction from taking place. In addition, in the light of the State party's own acknowledgement that victims of the alleged discrimination have the choice whether to submit a complaint before the Commission for Protection against Discrimination or before the court (see para. 4.6 above), the Committee accepts the authors' explanation that they could not have made recourse to the Commission in question, since the subject matter of the present communication has already been litigated before the State party's courts. Furthermore, as regards the possibility of complaining to the Ombudsman, the Committee recalls that any finding of this body would only have hortatory rather than binding effect on the authorities. It concludes that such a complaint cannot be considered an effective remedy,²¹ which the author was required to exhaust, for purposes of article 5, paragraph 2 (b), of the Optional Protocol. Under the circumstances, the Committee is satisfied that the authors, by having challenged before the Sofia City Court and the Supreme Administrative Court the eviction order of 24 July 2006, have exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

13.6 In relation to the alleged violation of article 26, read alone and in conjunction with article 2, as well as of article 2, read in conjunction with article 17, of the Covenant, in that the State party has failed to respect the equal protection and non-discrimination principles by denying the remedies and protection against forced eviction and demolition of housing to the authors, on the ground of their Roma ethnic origin, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. It further remains unclear whether these allegations were raised at any time before the State party's authorities and courts. In these circumstances, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

13.7 The Committee notes that the authors' references to articles 6 and 7 of the Covenant (see para. 9 above) concern arguments relating to the interim measures requested by the Committee, and were not raised as separate claims under the Covenant.

13.8 The Committee considers that the authors' remaining claims under article 17 of the Covenant are sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

14.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

²¹ See, communications No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 7.3, and No. 1184/2003, *Brough v. Australia*, Views adopted on 17 March 2006, para. 8.7.

14.2 The authors claim that the enforcement of the eviction order of 24 July 2006 and their subsequent removal from the Dobri Jeliazkov community would amount to subjecting them to arbitrary and unlawful interference with their homes and would, therefore, violate their respective rights under article 17 of the Covenant. In this regard, the Committee recalls that the term “home” as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation.²² In the present communication, it is undisputed that the Dobri Jeliazkov community where the authors’ houses are situated and where they have continuously resided existed with the acquiescence of the State party’s authorities for over seventy years and that the authors have police registration of their address. In these circumstances, the Committee is satisfied that the authors’ houses in the Dobri Jeliazkov community are their “homes” within the meaning of article 17 of the Covenant, irrespective of the fact that the authors are not the lawful owners of the plot of land on which these houses had been constructed.

14.3 The Committee must then determine whether the authors’ eviction and the demolition of their houses would constitute a violation of article 17 of the Covenant if the eviction order of 24 July 2006 were to be enforced. There is no doubt that the eviction order, if enforced, would result in the authors’ losing their homes and that, therefore, there would be an interference with their homes. The Committee recalls that, under article 17 of the Covenant, it is necessary for any interference with the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, that the concept of arbitrariness in article 17 of the Covenant is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.²³

14.4 The Committee notes the State party’s argument that the fact that the authors had not produced any evidence establishing their property rights over the plot of land where the structures of the Dobri Jeliazkov community are situated, was sufficient to establish that the eviction order of 24 July 2006 was lawful. Even assuming that the authors’ eviction and the demolition of their houses were permitted under the State party’s law, namely, article 65 of the Municipal Property Act and article 178, paragraph 5, of the Territory Law, the Committee notes, however, that the issue remains whether such interference would be arbitrary.

14.5 The Committee notes the authors’ claims that the Dobri Jeliazkov community existed with the acquiescence of the State party’s authorities for over seventy years, that the “green zone” was established retroactively (see paras. 6.2 and 7 above) and that, according to the mayor of the Sofia Municipality, Vuzrajane subdistrict, they could not be provided with social housing, since they lived in unlawful buildings constructed on municipal land (see para. 2.4 above). The Committee further notes that, although the State party’s authorities are in principle entitled to remove the authors, who occupy municipal land unlawfully, their lack of property rights over the plot of municipal land in question was the only stated justification for the issuance of the eviction order against the Dobri Jeliazkov community and that the State party has not identified any urgent reason for forcibly

²² See general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40, A/43/40*, annex, para. 5.

²³ *Ibid.*, para. 4. See also communications No. 1510/2006, *Vojnović v. Croatia*, Views adopted on 30 March 2009, para. 8.5, and No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

evicting the authors from their homes before providing them with adequate alternative accommodation.

14.6 The Committee considers it highly pertinent that, for several decades the State party's authorities did not move to dislodge the authors or their ancestors and, therefore, de facto tolerated the presence of the informal Dobri Jeliaskov community on municipal land. Moreover, despite the issuance of an expropriation order in 1974, the community has remained at its present location for over thirty years thereafter. While the informal occupants cannot claim an entitlement to remain indefinitely, the authorities' inactivity has resulted in the authors' developing strong links with the Dobri Jeliaskov site and building a community life there. In the Committee's view, these facts should have been taken into consideration in deciding whether and how to proceed with regard to the authors' homes built on municipal land. The eviction order of 24 July 2006 was based on section 65 of the Municipal Property Act, under which persons unlawfully living on municipal land can be removed regardless of any special circumstances, such as decades-old community life, or possible consequences, such as homelessness, and in the absence of any pressing need to change the status quo. In other words, under the relevant domestic law, the municipal authorities and the State party's courts were not required to have regard to the various interests involved or to consider the reasonableness of the authors' immediate eviction.

14.7 In the light of the long history of the authors' undisturbed presence in the Dobri Jeliaskov community, the Committee considers that, by not giving due consideration to the consequences of the authors' eviction from the Dobri Jeliaskov, such as the risk of their becoming homeless, in a situation in which satisfactory replacement housing is not immediately available to them, the State party would interfere arbitrarily with the authors' homes, and thereby violate the authors' rights under article 17 of the Covenant, if it enforced the eviction order of 24 July 2006.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party would violate the authors' rights under article 17 of the Covenant if it enforced the eviction order of 24 July 2006 so long as satisfactory replacement housing is not immediately available to them.

16. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including refraining from evicting them from the Dobri Jeliaskov community so long as satisfactory replacement housing is not immediately available to them. The State party is also under an obligation to ensure that similar violations do not occur in the future.

17. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**JJ. Communication No. 2120/2011, *Kovaleva and Kozyar v. Belarus*
(Views adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	Lyubov Kovaleva and Tatyana Kozyar (represented by counsel, Roman Kisliak)
<i>Alleged victims:</i>	The authors and Vladislav Kovalev, their son and brother respectively
<i>State party:</i>	Belarus
<i>Date of communication:</i>	14 December 2011
<i>Subject matter:</i>	Imposition of a death sentence after unfair trial
<i>Procedural issues:</i>	Standing to act on behalf of an alleged victim; State party's failure to cooperate and non-respect of the Committee's request for interim measures; insufficient substantiation of claims; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary deprivation of life; torture and ill- treatment; arbitrary deprivation of liberty; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of his defence and to communicate with his counsel; right not to be compelled to testify against himself or to confess guilt; right to have his sentence and conviction reviewed by a higher tribunal; interim measures to avoid irreparable damage to the alleged victim; right to freedom of thought, conscience and religion; violation of obligations under the Optional Protocol
<i>Articles of the Covenant:</i>	6, paragraphs 1 and 2; 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 (b), 3 (g) and 5; 18
<i>Articles of the Optional Protocol:</i>	1, 2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International
Covenant on Civil and Political Rights,

Meeting on 29 October 2012,

* The following members of the Committee participated in the examination of the present
communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji
Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael
O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat
Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Having concluded its consideration of communication No. 2120/2011, submitted to the Human Rights Committee by Lyubov Kovaleva and Tatyana Kozyar under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Lyubov Kovaleva and Tatyana Kozyar, both nationals of Belarus. They submit the communication on their own behalf and on behalf of Vladislav Kovalev, a national of Belarus born in 1986 (their son and brother, respectively) who at the time of submission of the communication was detained on death row after being sentenced to death by the Supreme Court of Belarus. The authors claim that Mr. Kovalev is a victim of violations by Belarus of his rights under article 6, paragraphs 1 and 2; article 7, article 9, paragraphs 1 and 3; and article 14, paragraphs 1, 2, 3 (b), 3 (g) and 5, of the International Covenant on Civil and Political Rights.¹ The authors also claim to be victims of a violation of articles 7 and 18 in their own respect. The authors are represented by counsel, Mr. Roman Kisliak.

1.2 When registering the communication on 15 December 2011, and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out Mr. Kovalev's execution while his case was under examination by the Committee. This request for interim measures of protection was subsequently reiterated on 27 January, 14 February, 1 March and 15 March 2012.

1.3 On 14 February 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

1.4 On 15 March 2012, in reply to the State party's note verbale dated 15 March 2012,² the Chairperson of the Committee reiterated the Committee's request for interim measures, drawing the State party's attention to the fact that non-respect of interim measures constitutes a violation by States parties of their obligations to cooperate in good faith under the Optional Protocol to the Covenant.

1.5 On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out. On the same day, the Committee issued a press release, deploring the execution.

The facts as presented by the authors

2.1 The authors submit that, on 30 November 2011, the Supreme Court of Belarus, acting as trial court, convicted Mr. Kovalev for commission of the following crimes: aggravated hooliganism; intentional destruction and damage of property committed by dangerous means; illegal acquisition, carrying, storing and selling explosives; storing, carrying and transporting an explosive device, committed repeatedly by a group of persons upon preliminary arrangement; failure to report the preparation of a particularly serious crime and of the person who committed such a crime and of his/her whereabouts; and

¹ The Optional Protocol entered into force for Belarus on 30 December 1992.

² See paragraphs 6.1–6.3.

aiding and abetting terrorist activities resulting in deaths, serious or other injuries, particularly large-scale damage or other serious consequences.

2.2 Mr. Kovalev was found guilty of these crimes purportedly committed between 2000 and 2011, including of aiding and abetting another defendant, Mr. K., in carrying out terrorist attacks on 11 April 2011 at Oktyabrskaya subway station in the city of Minsk. He was sentenced to death by shooting, without confiscation of property. At the time of submission of the communication, he was awaiting his execution in the investigation detention facility (SIZO) of the Belarus State Security Committee. On 7 December 2011, Mr. Kovalev prepared, in the presence of his lawyer, a power of attorney authorizing his mother, Ms. Kovaleva, to act on his behalf, and a written request for authentication of the document was lodged with the head of the SIZO. Although the lawyer was informed that the document would be ready the next day, it was never provided to him or Mrs. Kovaleva. She complained about this fact to the head of the SIZO, the president of the State Security Committee, the General Prosecutor and the Deputy President of the Supreme Court, to no avail.³

2.3 The authors submit that the decision of the Supreme Court of 30 November 2011 was not subject to appeal. On 7 December 2011, Mr. Kovalev submitted a request for pardon to the President of Belarus. The authors submit that, since both applications for supervisory review and for pardon are discretionary procedures, they had exhausted all available and effective domestic remedies.

The complaint

3.1 The authors submit that Mr. Kovalev was arrested on 12 April 2011 and was detained pending trial from 12 April 2011 to 15 September 2011, when he was for the first time brought before a judge. They contend that a delay of more than five months before bringing him before a judicial officer was excessively long and did not meet the requirement of promptness set out in article 9, paragraph 3, of the Covenant, and thus violates Mr. Kovalev's rights under article 9, paragraphs 1 and 3, of the Covenant.

3.2 The authors also claim that, in violation of article 7 and article 14, paragraph 3 (g), of the Covenant, Mr. Kovalev was subjected to physical and psychological pressure with the purpose to secure a confession of guilt. Officers of the Department for Combating Organized Crime talked to him in the absence of a lawyer. As a result of pressure, Mr. Kovalev made self-incriminating statements that allegedly served as a basis for his conviction. Before the confrontation with the other defendant, the investigator told him that if he changed his testimony during the court hearing, the prosecutor would insist on death penalty or life sentence; however, if he admitted his guilt, he would serve a limited prison term.

3.3 Mr. Kovalev subsequently retracted his confession during the court hearings, claiming that he was innocent and had made self-incriminating statements under pressure.⁴ The authors claim that, with the exception of his self-incriminating testimony, the court was not presented with any other evidence in support of his guilt. The video of a man with a bag that was used as evidence in the case and that, according to the prosecution, portrays the other defendant carrying the explosive device was allegedly tampered with and cannot be deemed authentic. The authors also submit that the law enforcement authorities claimed that Mr. Kovalev's bodily injuries attested during the investigation (bruise marks on his head on the right temple and on the chin, bruises on his hands resulted from rigid blunt

³ Authors provided copies of the respective complaints.

⁴ This fact is confirmed by the trial transcript (excerpts available on file).

objects, as well as on his shoulders and knees)⁵ were sustained as a result of the force used in the course of the arrest operation. The authors claim, however, that no such force was used, since Mr. Kovalev was asleep when he was arrested and was woken up by masked officers.⁶ In substantiation of their argument that Mr. Kovalev had not sustained any bodily injuries during his arrest, the authors refer to a picture of him taken on 12 April 2011 following his arrest (part of the materials of the preliminary investigation),⁷ as well as to his videotaped testimony broadcasted on official television channels after his arrest, depicting him sitting on the floor of the apartment with his hands handcuffed behind his back. None of the injuries attested on 13 April 2011 by the forensic medical examination are visible either on the picture or on the videotape, which confirms the fact that Mr. Kovalev was subjected to pressure after his arrest, in violation of the prohibition of torture and his right not to be compelled to testify against himself or to confess guilt, as set forth in articles 7 and 14, paragraph 3 (g), of the Covenant.

3.4 The authors further claim that the trial court was biased and violated the principle of independence and impartiality, in violation of article 14, paragraph 1, of the Covenant. They consider that the court was under pressure: the access in the court room, besides police officers, was controlled by other unidentified persons in civilian clothes, who refused to disclose their identity. They were allegedly obviously officers of intelligence services. They were checking the persons entering the court room and could refuse access to or even arrest persons who came to attend the trial. This created an atmosphere of fear and is an indication of the pressure exercised on the court, as well as of the violation of the principle of publicity of court proceedings. The court also violated the principle of impartiality and equality of arms by rejecting most of the requests of the defence, at the same time satisfying all the motions submitted by the prosecution.

3.5 Following Mr. Kovalev's arrest and before his conviction by the court, several State officials made public statements affirming his guilt, in violation of the principle of presumption of innocence. His guilt was also widely discussed in the official mass media, in particular the news agency BELTA (Belarusian Telegraph Agency), which presented to the public at large materials of the preliminary investigation as *fait accompli*⁸ long before the consideration of the case by the court, thus engendering among the public a negative attitude towards Mr. Kovalev, as if he was already a confirmed criminal. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room⁹ were published in the local print media. Undoubtedly, such behaviour created a public negative attitude towards Mr. Kovalev and influenced the court in sentencing him to death. The authors recall that, according to paragraph 30 of the Committee's general comment No. 32 (2007) on the right to equality before courts and

⁵ Although the authors could not provide a copy of the report of the forensic medical examination of 13–25 April 2011 attesting these injuries, they provided a copy of a newspaper article published by *BelGazeta* in issue No. 40 (814) of 10 October 2011, which states, *inter alia*, that the defence lawyer drew the court's attention to Mr. Kovalev's injuries and read out the conclusion of the forensic medical examination, according to which he had bruise marks on the chin, on the right temple of his head, on his hands, forearm and knees, caused by rigid blunt objects.

⁶ Mr. Kovalev stated during the court proceedings that he was woken up by masked officers, this statement being recorded in the trial transcript (excerpt available on file).

⁷ The authors provided the picture in question.

⁸ The authors supplied, *inter alia*, a copy of an article published by BELTA on 18 August 2011, citing as a source law enforcement bodies. The article refers to the accused as "terrorists" and discloses extensive information about the acts committed by them as well as other details of the investigation.

⁹ Such photographs are available on file.

tribunals and to a fair trial,¹⁰ defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. They claim that the above facts disclose a violation of Mr. Kovalev's presumption of innocence guaranteed under article 14, paragraph 2, of the Covenant.

3.6 The authors claim a violation of Mr. Kovalev's rights under article 14, paragraph 3 (b), of the Covenant. During the pretrial investigation, Mr. Kovalev was visited by his lawyer only once, and for the rest they met only during investigative actions. The lawyer did not have the opportunity to meet and talk to him confidentially. On 14 September 2011, on the eve of the court hearings, the lawyer was denied access to his client. Mr. Kovalev's requests for confidential meetings with his lawyer were rejected.¹¹ The lawyer was able to talk to Mr. Kovalev only before the start of court hearings when he was brought to the court and put in the cage, i.e. for not more than between three and five minutes. On three occasions, they were able to talk for half an hour, one hour and two hours respectively, as well as before the start of pleadings. The authors claim that, in the circumstances, Mr. Kovalev's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, as set forth in article 14, paragraph 3 (b), of the Covenant, has been violated.

3.7 Furthermore, the authors also allege a violation of article 14, paragraph 5, of the Covenant. They submit that the sentence handed down by the Supreme Court is not subject to appeal, therefore the State party violated Mr. Kovalev's right to have his sentence and conviction reviewed by a higher tribunal.

3.8 The authors also claim that Mr. Kovalev was sentenced to death after a trial conducted in violation of the fair trial guarantees set forth in article 14 of the Covenant. Therefore, in accordance with the Committee's established practice, this amounts to a violation of Mr. Kovalev's right to life under article 6 of the Covenant.

3.9 On 13 May 2012, after the execution of Mr. Kovalev had been carried out, the authors supplemented their initial communication to the Committee with new allegations. They claim that, by proceeding with the execution of Mr. Kovalev despite the Committee's request for interim measures to suspend his execution while his case is under consideration by the Committee, the State party violated the provisions of the Optional Protocol to the Covenant. They urge the Committee to recommend that the State party include a rule in its legislation that would provide for the suspension of the execution of a death sentence in a given case in view of the registration by the Committee of an individual communication alleging a violation of the right to life and the Committee's request for interim measures of protection, so as to prevent such violations in the future.

3.10 The authors further submit that the date of the execution was kept secret, and was not known as at 11 March 2012 when they visited Mr. Kovalev in the SIZO. The execution was carried out on 15 March 2012. Based on the practice of execution of capital sentences in Belarus, the authors believe that Mr. Kovalev was not informed beforehand of the date of the execution. Therefore they claim that Mr. Kovalev's situation of uncertainty about his fate from the date on which his death sentence was imposed (30 November 2011) until its execution (15 March 2012) caused him additional mental distress, in violation of article 7

¹⁰ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

¹¹ The authors provided an excerpt from the trial transcript, confirming that Mr. Kovalev requested the court to give him the opportunity to communicate with his lawyer in private, since he had not had such a possibility before the initiation of court proceedings. The court declined this request, and Mr. Kovalev's lawyer then inquired about the possibility to communicate with the accused during the break, to which the presiding judge responded in the affirmative.

of the Covenant. They request the Committee to find such practice of non-disclosure of the date of the execution unacceptable and contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and to recommend that Belarus abolish this inhuman practice and bring it in line with its obligations under article 7 of the Covenant.

3.11 Furthermore, the authors submit that, from 13 March 2012 (when mass media published information about the consideration of Mr. Kovalev's application for pardon) to 17 March 2012 (when they received the letter of the Supreme Court informing them that the execution had been carried out) they had no information about Mr. Kovalev's whereabouts and whether he was alive or not. The lawyer was denied access to him. The authors therefore claim that the atmosphere of complete secrecy surrounding the date, time and place of the execution caused them severe mental suffering and stress, in violation of their rights under article 7 of the Covenant, and request the Committee to recommend that the State party abolish such practice of not informing relatives about the date of execution of persons sentenced to death.

3.12 Finally, the authors claim that, following the execution of Mr. Kovalev, the State party's authorities consistently refused to hand over his body for burial, invoking article 175, paragraph 5, of the Criminal Execution Code according to which relatives are not informed in advance of the date of execution, the body is not handed over and the place of burial is not disclosed.¹² They submit that they are Orthodox Christians and wish to bury Mr. Kovalev in accordance with their religious beliefs and rituals. The State party's authorities also refuse to disclose the location of Mr. Kovalev's grave. The authors therefore claim that the State party's refusal to hand over Mr. Kovalev's body for burial amounts to a violation of their rights under article 18 of the Covenant. This refusal prevented them from burying Mr. Kovalev in accordance with the requirements of the Orthodox Christianity, in violation of the right to manifest one's religion and to perform religious rites and rituals, as set forth in article 18 of the Covenant. They request the Committee to recommend that Belarus abolish the practice of not returning the body of executed persons to relatives and of concealing from relatives the location of the burial site.

State party's observations on admissibility

4.1 By note verbale dated 24 January 2012, the State party contests the registration of the communication, claiming that it was registered in breach of article 1 of the Optional Protocol. The State party also submits that Mr. Kovalev had not exhausted domestic remedies, as required under the Optional Protocol. Although Mr. Kovalev filed a supervisory review application to the Supreme Court and lodged an application for presidential pardon, both applications were still pending before national authorities.

4.2 According to article 24 of the Constitution of Belarus, the death penalty may be applied in accordance with the law as an exceptional penalty for the most serious crimes and only in accordance with the verdict of a court of law. Pursuant to article 59 of the Criminal Code of Belarus, the death sentence may be applied as an exceptional measure for particularly serious crimes involving premeditated deprivation of life with aggravating circumstances. In this regard, Mr. Kovalev was sentenced to death following the judgment handed down by a court of law, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus and therefore the imposed death penalty is not contrary to the international instruments to which Belarus is a party. According to national legislation, the execution of Mr. Kovalev was suspended until competent authorities decided on his applications for supervisory review and presidential pardon.

¹² The authors provided copies of letters emanating from the Ministry of Interior, the Presidential Administration and the Prosecutor's office of Minsk city.

4.3 On 25 January 2012, the State party submits, with regard to the present communication together with around sixty other communications that, when becoming a State party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that recognition of competence is done in conjunction with other provisions of the Optional Protocol, including those that set criteria regarding petitioners and admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. It maintains that under the Optional Protocol, the States parties have no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions, which "could only be efficient when done in accordance with the Vienna Convention of the Law on Treaties". It submits that "in relation to the complaint procedure the State Parties should be guided first and foremost by the provisions of the Optional Protocol" and that "references to the Committee's longstanding practice, methods of work, case law are not subject of the Optional Protocol". It further submits that "any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights will be viewed by the State party as incompatible with the Protocol and will be rejected without comments on the admissibility or on the merits". The State party further maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

Author's comments on the State party's observations on admissibility

5.1 The authors provided their comments on 8 February 2012. They confirm that the communication was registered by the Human Rights Committee before the State party decided on Mr. Kovalev's applications for supervisory review and presidential pardon. They claim however that neither the request for pardon, nor the application for supervisory review to the Supreme Court constitute domestic remedies that must be exhausted before a communication is submitted to the Committee. The presidential pardon is a remedy of humanitarian character, and not a legal remedy. Also, the application for supervisory review cannot be regarded as an effective remedy, since the lodging of such an application does not automatically lead to its consideration. The convicted person requests the president of the court to file a protest motion. Only the protest filed at the request of the convicted person triggers the procedure of supervisory review of the court decision. Such a protest motion, if admitted, is considered by a collegial organ, the presidium of the court. However, the supervisory review application itself is considered by a single judge in the absence of public hearings, and therefore cannot be regarded as a remedy.

5.2 The authors further submit that, according to the Committee's established practice, only domestic remedies that are both available and effective must be exhausted. The Committee does not consider the requests for pardon and supervisory review applications as domestic remedies that must be exhausted before a communication is submitted. According to the Committee's jurisprudence, presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.¹³

5.3 On 29 February 2012, the authors informed the Committee that the Supreme Court had dismissed Mr. Kovalev's supervisory review application on 27 February 2012.

State party's further observations on admissibility and merits

6.1 In a note verbale of 15 March 2012, the State party claimed that the communication was inadmissible, since it was submitted to the Committee by third parties and not by the alleged victim himself. With reference to article 1 of the Optional Protocol to the Covenant,

¹³ Communication No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

it submits that the Republic of Belarus has recognized the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any rights set forth in the Covenant. The Optional Protocol did not approve the competence of the Committee to provide an interpretation of article 1 which deviates from the language agreed by States parties. The Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) stipulate that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Only subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account and no such agreement was concluded. Accordingly, the Optional Protocol and its provisions cannot be substituted for the Committee's rules of procedure and its practice because it deprives the Optional Protocol of its object and purpose.

6.2 As regards the merits of the case, the State party submits that Mr. Kovalev was sentenced to death by the Supreme Court of Belarus, the highest judicial instance in Belarus. Article 6, paragraph 2, of the Covenant, stipulates that a sentence of death may be imposed only for the most serious crimes in accordance with the law in force. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

6.3 With regard to the Committee's request not to execute Mr. Kovalev while his communication is pending before the Committee, the State party notes that such a request is beyond the mandate of the Committee and is not binding in terms of its international legal obligations. Accordingly, the Criminal Code is the only source of criminal law in Belarus. It recalls that Mr. Kovalev lodged a supervisory application to the Supreme Court and applied for presidential pardon. In accordance with national legislation, the death penalty cannot be carried out until such applications are considered.

Authors' further submissions

7.1 On 19 March 2012, the authors notified the Committee that on 17 March 2012 they had received a letter from the Supreme Court, dated 16 March 2012, informing them of the execution of Mr. Kovalev.

7.2 On 30 March 2012, the authors provided additional information. They submit that on 11 March 2012 they were granted permission for a meeting with Mr. Kovalev, this being the last time they had seen him alive. On 13 March 2012, local mass media published information, according to which Mr. Kovalev's application for pardon had been considered, without however indicating the outcome. On 13 and 14 March 2012, Mr. Kovalev's lawyer was denied access to him, without any explanations. In the evening of 14 March 2012, mass media reported that the President of Belarus refused to grant pardon to Mr. Kovalev and the other defendant.

7.3 On 15 March 2012, Ms. Kovaleva travelled to Minsk in order to find out the fate of her son. On the same day, the lawyer's attempt to obtain a meeting with Mr. Kovalev again failed and he was told that Mr. Kovalev had been transferred, without any further details about his whereabouts being provided. On 15 March 2012, Mrs. Kovaleva submitted a written application to the President of Belarus, requesting the suspension of her son's execution for at least one year in order for the Human Rights Committee to take a decision on his communication.

7.4 On 16 March 2012, Ms. Kovaleva, together with the lawyer of Mr. Kovalev, attempted to obtain information on his whereabouts and whether he was alive. However, they could not obtain any such information from authorities. On 17 March 2012, Mrs. Kovaleva received a letter from the Supreme Court, dated 16 March 2012, informing her of

the execution of her son. On 28 March 2012, she obtained the death certificate which indicates 15 March 2012 as the date of death.

State party's further submission

8. By note verbale dated 19 July 2012, the State party informed the Committee that it discontinued proceedings regarding the present communication and will dissociate itself from the Views that might be adopted by the Human Rights Committee.¹⁴

Issues and proceedings before the Committee

The State party's failure to cooperate and to respect the Committee's request for interim measures

9.1 The Committee notes the State party's submission: that there are no legal grounds for the consideration of the present communication insofar as it is registered in violation of article 1 of the Optional Protocol, because the alleged victim did not present the communication himself and has failed to exhaust domestic remedies; that it has no obligations regarding the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions; and that decisions taken by the Committee on the above communications will be considered by its authorities as "invalid".

9.2 The Committee recalls that article 39, paragraph 2 of the International Covenant on Civil and Political Rights authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual concerned (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.¹⁵ The Committee observes that, by failing to accept the Committee's determination whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and the merits of the communication, the State party violates its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

9.3 Furthermore, the Committee observes that, when submitting the communication on 14 December 2011, the authors informed the Committee that at that point Mr. Kovalev was on death row. On 15 December 2011, the Committee transmitted to the State party a request not to carry out Mr. Kovalev's execution while his case was under consideration; this request for interim measures was reiterated several times. On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out and later provided a copy of the death certificate indicating 15 March 2012 as the date of his death,

¹⁴ The State party also provided the Committee with a DVD documentary film, "Subway", containing materials related to the investigation of the criminal charges against the alleged victim and the other defendant, including statements made by them during the investigation.

¹⁵ See, inter alia, communications No 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1, and No. 1041/2001, *Tulyaganova v. Uzbekistan*, Views adopted on 20 July 2007, paras. 6.1–6.3.

but not disclosing the cause of his death. The Committee notes that it is uncontested that the execution in question took place despite the fact that a request for interim measures of protection had been duly addressed to the State party and reiterated several times.

9.4 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present case, the authors allege that Mr. Kovalev was denied his rights under various articles of the Covenant. Having been notified of the communication and the Committee's request for interim measures, the State party breached its obligations under the Protocol by executing the alleged victim before the Committee concluded its consideration of the communication.

9.5 The Committee recalls that interim measures under rule 92 of its rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of Mr. Kovalev, undermines the protection of Covenant rights through the Optional Protocol.¹⁶

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 The Committee takes note of the State party's argument that the communication is inadmissible since it was submitted to the Committee by third parties and not by the alleged victim himself. In this respect, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally.¹⁷ In the present case, the Committee notes that the alleged victim was being detained on death row at the time of submission of the communication, and that, although he prepared and signed a power of attorney authorizing his mother to act on his behalf, the administration of the SIZO failed to authenticate it, despite several complaints being lodged with relevant domestic authorities (see para. 2.2 above). In the circumstances, the failure to provide a power of attorney cannot be attributable to the alleged victim or to his relatives. The Committee further recalls that, where it is impossible for the victim to authorize the communication, the Committee has considered a close personal relationship to the alleged victim, such as family ties, as a sufficient link to justify an author acting on behalf of the alleged victim.¹⁸ In the present case, the communication was submitted on behalf of the alleged victim by his mother and his sister, who have presented a duly signed power of attorney for the counsel to represent them before the Committee. The Committee therefore considers that the authors are

¹⁶ See, inter alia, communications No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 4.4; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, paras. 6.1–6.3; No. 1280/2004, *Tolipkhuzhaev v. Uzbekistan*, Views adopted on 22 July 2009, para. 6.4.

¹⁷ See also communication No. 1355/2005, *X. v. Serbia*, inadmissibility decision of 26 March 2007, para. 6.3.

¹⁸ See *Official Records of the General Assembly, Thirty-third Session, Supplement No. 40 (A/33/40)*, para. 580. See also, inter alia, communications No. 5/1977, *Bazzano v. Uruguay*, Views adopted on 15 August 1979, para. 5; No. 29/1978, *E. B. v. S.*, decision on admissibility adopted on 14 August 1979; No. 43/1979, *Drescher v. Uruguay*, Views adopted on 21 July 1983, para. 3.

justified by reason of close family connection in acting on behalf of Mr. Kovalev. Accordingly, the Committee is not precluded by article 1 of the Optional Protocol from examining the communication.

10.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.4 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that Mr. Kovalev had not exhausted all domestic remedies at the time of submission of his communication in view of the fact that his applications for supervisory review and for presidential pardon were still pending before national authorities. In this regard, the Committee notes that Mr. Kovalev's application for supervisory review and presidential pardon were rejected on 27 February 2012 and 14 March 2012 respectively, and reiterates its previous jurisprudence, according to which a supervisory review is a discretionary review process¹⁹ and presidential pardons are an extraordinary remedy²⁰ and as such none of them constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. Therefore, the Committee is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

10.5 In the absence of any information or evidence in support of the authors' claim that Mr. Kovalev's rights under article 9, paragraph 1, of the Covenant have been violated, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

10.6 The Committee considers that the remaining allegations raising issues under article 6, paragraphs 1 and 2; article 7, article 9, paragraph 3; and article 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant in respect of Mr. Kovalev, and under articles 7 and 18 in respect of the authors themselves, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes the authors' claims under articles 7 and 14, paragraph 3 (g), of the Covenant that Mr. Kovalev was subjected to physical and psychological pressure with the purpose of eliciting a confession of guilt and that, although he retracted his self-incriminating statements during court proceedings, his confession served as a basis for his conviction. In this regard, the Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and

¹⁹ See the Committee's general comment No. 32, para. 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor"; and, for example, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.2; No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, para. 10.13; No. 1344/2005, *Korolko v. Russian Federation*, inadmissibility decision of 25 October 2010, para. 6.3; No. 1449/2006, *Umarov v. Uzbekistan*, Views adopted on 19 October 2010, para. 7.3.

²⁰ See communications No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.4; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

impartially.²¹ It further recalls that the safeguard laid down in article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.²² As it transpires from the decision of 30 November 2011, the Supreme Court considered that Mr. Kovalev changed his statements in order to mitigate his punishment, stating that the confessions of the accused and other evidence were obtained in strict compliance with the criminal procedure norms and were thus admissible as evidence. However, the State party has not presented any information to demonstrate that it conducted any investigation into these allegations. In these circumstances, due weight must be given to the authors' claims and the Committee concludes that the facts before it disclose a violation of Mr. Kovalev's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.²³

11.3 As to the authors' claim that Mr. Kovalev was arrested on 12 April 2011 and was brought for the first time before a judge only on 15 September 2011, i.e. after more than five months from the arrest, the Committee notes that the State party failed to address these allegations. While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons²⁴ and its jurisprudence,²⁵ pursuant to which delays should not exceed a few days. The Committee therefore considers the delay of five months before bringing Mr. Kovalev before a judge to be incompatible with the requirement of promptness set forth in article 9, paragraph 3, and thus in violation of Mr. Kovalev's rights under this provision.

11.4 The Committee further notes the authors' allegations that the principle of presumption of innocence was not respected, because several State officials made public statements about Mr. Kovalev's guilt before his conviction by the court and mass media made available to the public at large materials of the preliminary investigation before the consideration of his case by the court. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room were published in local print media. In this respect, the Committee recalls its jurisprudence²⁶ as reflected in its general comment No. 32, according to which "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the

²¹ See the Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

²² See, for example, the Committee's general comment No. 32, para. 41; communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 1769/2008, *Bondar v. Uzbekistan*, Views adopted on 25 March 2011, para. 7.6.

²³ See, for example, the Committee's general comment No. 32, para. 60; communications No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.2.

²⁴ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 2.

²⁵ The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4). The Committee also concluded that a delay of one week in a capital case cannot be deemed compatible with article 9, paragraph 3 (see communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6).

²⁶ See, for example, communications No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000, para. 8.3; No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.5.

burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle”.²⁷ The same general comment refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused;²⁸ it further states that defendants should normally not be shackled or kept in cages during trial or otherwise presented to the court in a manner indicating that they may be dangerous criminals and that the media should avoid news coverage undermining the presumption of innocence. On the basis of the information before it and in the absence of any other pertinent information from the State party, the Committee considers that the presumption of innocence of Mr. Kovalev guaranteed under article 14, paragraph 2, of the Covenant has been violated.

11.5 With regard to the authors’ claims that Mr. Kovalev was visited by his lawyer only once during the pretrial investigation, that the confidentiality of their meetings was not respected, that they did not have adequate time to prepare the defence and that the lawyer was denied access to him on several occasions, the Committee recalls that article 14, paragraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, this provision being an important element of the guarantee of a fair trial and an application of the principle of equality of arms.²⁹ The right to communicate with counsel requires that the accused is granted prompt access to counsel, and counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.³⁰ The Committee is of the view that the conditions, as described by the authors, in which Mr. Kovalev was assisted by his lawyer during the pretrial investigation and in the course of court proceedings adversely affected his possibilities to prepare his defence.³¹ In the absence of any information by the State party to refute the authors’ specific allegations and in the absence of any other pertinent information on file, the Committee considers that the information before it reveals a violation of Mr. Kovalev’s rights under article 14, paragraph 3 (b), of the Covenant.

11.6 The authors further claim that Mr. Kovalev’s right to have his sentence and conviction reviewed by a higher tribunal was violated in view of the fact that the sentence rendered by the Supreme Court is not subject to appeal. The Committee observes that, as it transpires from materials before it, Mr. Kovalev was sentenced to death at first instance by the Supreme Court on 30 November 2011 and the judgment mentions that it is final and not subject to any further appeal. Although Mr. Kovalev availed himself of the supervisory review mechanism, the Committee notes that such review only applies to already executory decisions and thus constitutes an extraordinary means of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence and therefore cannot be characterized as an “appeal”, for the purposes of article 14, paragraph 5.³² The Committee recalls in this respect that even if a system of appeal may not be automatic, the

²⁷ See Committee’s general comment No. 32, para. 30.

²⁸ Ibid., para. 30.

²⁹ Ibid., para. 32.

³⁰ Ibid., para. 34. See also communications No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000, para. 8.5.

³¹ See communications No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.4; No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991, para. 8.4; No. 1167/2003, *Rayos v. Philippines*, Views adopted on 27 July 2004, para 7.3.

³² See footnote 19 above.

right to appeal under article 14, paragraph 5 imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.³³ In the absence of any explanation from the State party, the Committee considers that the absence of a possibility to appeal the judgment of the Supreme Court passed at first instance to a higher judicial instance is inconsistent with the requirements of article 14, paragraph 5.³⁴

11.7 The Committee notes the authors' allegations, not refuted by the State party, that the Supreme Court was biased, and violated the principle of independence, impartiality, equality of arms and the principle of publicity of court proceedings, contrary to article 14, paragraph 1, of the Covenant. In the light of the Committee's findings that the State party failed to comply with the guarantees of a fair trial under article 14, paragraphs 2, 3 (b) and (g), and 5, of the Covenant, the Committee is of the view that Mr. Kovalev's trial suffered from irregularities which, taken as a whole, amount to a violation of article 14, paragraph 1, of the Covenant.

11.8 The authors further claim a violation of Mr. Kovalev's right to life under article 6 of the Covenant, since he was sentenced to death after an unfair trial. The Committee notes that the State party has argued, with reference to article 6, paragraph 2, of the Covenant, that Mr. Kovalev was sentenced to death following the judgment handed down by the Supreme Court, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus, and that the imposed death penalty was not contrary to the international instruments to which Belarus is a State party. In this respect, the Committee recalls its general comment No. 6 (1982) on the right to life, where it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, which implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal".³⁵ In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant.³⁶ In the light of the Committee's findings of a violation of article 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, it concludes that the final

³³ See Committee's general comment No. 32, para. 48; communications No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5; No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 6.5; No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000, para. 11.1.

³⁴ See, for example, communications No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5.

³⁵ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 7; see also communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.14.

³⁶ See the Committee's general comment No. 32, para. 59; communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.7; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.6; No. 1276/2004, *Idieva v. Tajikistan*, Views adopted on 31 March 2009, para. 9.7; No. 1304/2004, *Khoroshenko v. Russian Federation*, Views adopted on 29 March 2011, para. 9.11; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.5.

sentence of death in respect of Mr. Kovalev was passed without having met the requirements of article 14, and that as a result article 6 of the Covenant has been violated.

11.9 In the light of the above finding of a violation of article 6 of the Covenant, the Committee will not examine separately the authors' allegation under article 7 with regard to Mr. Kovalev's mental distress caused by the situation of uncertainty about his fate (see para. 3.10 above).

11.10 The Committee notes the authors' claim that they themselves are victims of a violation of article 7 of the Covenant in view of the severe mental suffering and stress caused to them as a result of the authorities' refusal to reveal any detail about Mr. Kovalev's situation or whereabouts from 13 March 2012 (rejection of his application for pardon) until 17 March 2012 (when they were informed that the death sentence had been carried out), as well as their failure to inform them beforehand of the date, time and place of the execution, to release the body for burial and to disclose the location of Mr. Kovalev's burial site. These allegations remain unchallenged by the State party. The Committee notes that the law in force prescribes that the family of an individual under sentence of death is not informed in advance of the date of the execution, the body is not handed over to them and the location of the burial site of the executed prisoner is not disclosed. The Committee understands the continued anguish and mental stress caused to the authors, as the mother and sister of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave. The complete secrecy surrounding the date of the execution and the place of burial, as well as the refusal to hand over the body for burial in accordance with the religious beliefs and practices of the executed prisoner's family have the effect of intimidating or punishing the family by intentionally leaving it in a state of uncertainty and mental distress. The Committee therefore concludes that these elements, cumulatively, and the State party's subsequent persistent failure to notify the authors of the location of Mr. Kovalev's grave, amount to inhuman treatment of the authors, in violation of article 7 of the Covenant.³⁷

11.11 Having come to this conclusion, the Committee will not examine the authors' separate allegations under article 18 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of Mr. Kovalev's rights under articles 6; 7; 9, paragraph 3; and 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, as well as under article 7 in relation to the authors themselves. The State party also breached its obligations under article 1 of the Optional Protocol to the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation for the anguish suffered, and disclosure of the burial site of Mr. Kovalev. The State party is also under an obligation to prevent similar violations in the future, including by amending article 175, paragraph 5 of the Criminal Execution Code so as to bring it in line with the State party's obligations under article 7 of the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

³⁷ See also communications No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2; No. 887/1999, *Staselovich v. Belarus*, Views adopted on 3 April 2003, para. 9.2; No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.7; No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.7; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7.

violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]
